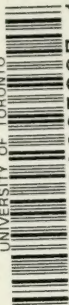


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PREFACE

The theory of international law upon which this study is based may be briefly summarized in a few statements. With the present system of world organization, effective enforcement of law is only possible through action by state administrative and judicial organs. International law, therefore, can not be effectively enforced except over persons subject to the jurisdiction of the state. We may therefore conclude that international law can be effectively enforced only in so far as it prescribes conduct for persons and subordinate agencies of government.

The essential feature of international law is not that it lays down rules of conduct for states, but that it holds states responsible for the conduct of persons. International law, therefore, should be regarded as the law binding the members, both persons and states, of a "supra-national" state or a "community of nations", the enforcement of which is delegated to the organs of the states composing it. The German Constitution, with its system of imperial law, binding on individuals but enforced largely through the administrative officers and courts of the component states, furnishes an illustration of such a system.

The recognition of this fact, that international law reaches down to individuals, is, therefore, important. International law can become effective through state enforcement in proportion as it lays down obligations for persons, rather than for states. Much of it now consists of rules prescribed for persons and officers of government and the greater part of it can be described in terms of such rules because the state can only act through human agencies. When we say that a state is obliged to do or abstain from doing certain acts, we can only mean that its chief executive officer, or its legislature, or its courts are bound to observe certain rules, which, by proper constitutional checks, it is possible for municipal law to enforce.

With this conception, that international law prescribes rules of conduct for persons and public officers and imposes obligations upon states, to enforce them, we shall consider the rules of municipal law enforced in the United States in pursuance of this international obligation.

The distinction between a legal and a political method of

enforcement has been kept in mind. Where action is left to the discretion of military, naval or executive officers or legislative bodies as cases arise, the rule is not considered one of municipal law. The term is only applied to the rules laid down as permanent and enforceable by governmental authority according to an established procedure, either judicial or administrative.

The title to be given this study caused the author much perplexity, and doubtless the one finally decided upon is open to criticism. Mr. A. V. Dicey entitled his book on private international law, "A Digest of the Law of England with reference to the Conflict of Law." Perhaps this thesis could be entitled "A Digest of the Law of the United States with reference to International Law." Such a title, however, would imply a more or less exhaustive treatment of the subject. The present work does not pretend to digest the whole of the law of the United States relating to the enforcement of international obligations. It is intended merely to suggest a field which the writer believes will bear further exploration. The title first considered was "The Extent to which International Law is Incorporated into the Law of the United States." Such a title would have excluded consideration of the rules which we have designated as laws supplementary to international law. These are municipal law enforcing international obligations but are not rules of international law incorporated into municipal law. The title finally settled upon is certainly inclusive enough and indicates that discussion is limited to the rules of international law enforced as *law* in the United States, excluding those enforced by executive authorities as "political questions."

The general subject of the relationship of international to municipal law has not been extensively considered in any English treatise. Holland's excellent article on "International Law and Acts of Parliament" published in his "Studies on International Law" is a brief but valuable contribution. Professors J. B. Scott and W. W. Willoughby in articles in the American Journal of International Law, Westlake in an article entitled, "Is International Law a part of the Law of England?" published in the Law Quarterly Review, and Lawrence in his "Essays on some disputed Questions of International Law" have discussed the nature of international law and its relation to municipal law, especially to the judiciary. Since this work was completed an excellent discussion of "The Relation of International Law to the Law of England and of the United States of America" by C. M. Picciotto has been published. This writer deals especially

with the relative legal force of statutes, executive orders, treaties and customary international law in the courts of England and the United States. Walker in his "Science of International Law", Westlake in his "Principles" as well as in his more recent work on "International Law", and A. H. Snow in several articles in the American Journal of International Law have emphasized the idea that international law is law governing individuals regarded as members of a society of nations, rather than law simply *between* nations, as the name suggests. The last writer in fact suggests the term "supra or super national" as a more appropriate term.

Writers on jurisprudence have sometimes considered the subject but usually very briefly. With Austin's example before them, they have excluded international law from the scope of their subject. Gray's "Nature and Sources of the Law" and Stephen's "History of the Criminal Law of England" contain particularly lucid expositions from this standpoint.

The most important contributions to the subject are in German. H. Triepel in his "Völkerrecht und Landesrecht" considers the nature, sources and relationship of international and municipal law. W. Kaufmann, in "Die Rechtskraft des Internationalen Rechtes und das Verhältnisse des Staats Organs zu demselben" covers somewhat the same ground, but emphasizes particularly the legal authority of international law and treaties as immediate sources of municipal law.

In the present work, the writer has attempted to discover the actual situation in the United States, with only incidental reference to the theoretical relationship of the two branches of jurisprudence. Primary reference has therefore been made to the treaties, statutes, executive orders and court decisions of the United States. Had it not been for the orderly arrangement of much of this material in Moore's "Digest of International Law", a monumental contribution to the science, the work would have been practically impossible. Moore's International Arbitrations have also been used, as have the collections of cases by Freeman Snow, J. B. Scott, Pitt Cobbett, and Norman Bentwich. Much use has also been made of the annual publications of the Naval War College, in which numerous points of prize law have been exhaustively discussed with especial reference to the practice of the United States. Professor C. G. Fenwick's recent work on the Neutrality laws of the United States has been constantly referred to in dealing with that subject. Tucker and Blood's edition of the Penal Code of 1910, Davis's edition of the Military

Laws and Howland's Digest of Opinions of the Judge Advocates General, all exhaustively annotated, have also been of assistance. The standard treatises on international law, of which those by Professors G. G. Wilson and Amos S. Hershey are particularly rich in references illustrative of American practice, have, of course, been examined.

The work has been carried through under the guidance of Professors J. W. Garner and Walter Fairleigh Dodd, to both of whom the author wishes to make grateful acknowledgement for many suggestions and much helpful criticism.

Champaign, Illinois,

January, 1916.

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INTRODUCTION

POSSIBILITY OF ENFORCING INTERNATIONAL BY MUNICIPAL LAW

It is the purpose of this thesis to discover how and to what extent international law is enforced by municipal law in the United States. For an adequate treatment of the subject a more or less definite meaning must be attached to the terms municipal law and international law. This is all the more necessary because, with a common view of these two branches of jurisprudence, our inquiry would be not only fruitless but impossible. Thus there is a common opinion which limits the connotation of international law to relationships between states regarded as independent political communities, exclusively.¹ With this view the state is regarded as a unit, an organism whose control is concentrated in a single will designated by the term sovereignty. It is with sovereigns alone that international law has to do.

Municipal law on the other hand is held to be law within the state. The sovereign enforces it but can not be bound by it. As well say that a dynamo can drive the engine which moves it, as to say the sovereign power can be controlled by the municipal law

¹See Bentham, "With regard to the political equality of the persons whose conduct is the object of the law. They may, on any given occasion, be considered either as members of the same state, or members of different states. In the first case the law may be referred to the head of internal; in the second case to that of international jurisprudence. Now as to any transactions which may take place between individuals who are subjects of different states: those are regulated by the internal laws and decided upon by the internal tribunals of the one or the other of these states, the case is the same where the sovereign of the one has any immediate transaction with a private member of the other. * * * There remains, then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international law." *Introduction to Principles of Morals and Legislation*, Works, Bowring, Ed., 3;149. See also Travers Twiss, *Law of Nations considered as Independent Political Communities*, Oxford, 1884, p. 2; T. E. Holland, *The Elements of Jurisprudence*, 11th ed., N. Y., 1910, pp. 385-389, 402.

it makes and enforces.² How then can municipal law enforce international law? Clearly with this conception of international law it can not.

Although this theory of international law is often enunciated, it is never adhered to in discussions of the subject with the meaning just outlined. All writers on international law discuss rights and duties of ambassadors and consuls, of armed forces, of aliens, of neutral vessels in time of naval war, etc. International law as well as municipal law contains rules relating to the conduct of persons. Were such rules omitted from the subject, international law would be reduced to a few precepts telling when a state may make war, how far it may exercise jurisdiction, and how and when it may acquire territory, some of which on investigation would be found to be rules of policy rather than of law.

International law is not to be distinguished from municipal law by the assertion that the former relates to the conduct of states, the latter to the conduct of individuals within the state. Not state conduct, but state responsibility is the criterion of international law. International law prescribes rules of conduct which the individual must observe, but if he fails to observe them it pays no attention to the individual but declares that the state of which he is a member is responsible and liable. All rules, for the breach of which states will be held liable, are rules of international law.

Thus international law and municipal law are not mutually exclusive. The same rules may be prescribed by both. Both international law and the municipal law of the United States say

²Cf. Justice Holmes, a "A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," *Kawananako vs. Polyblank*, 205 U. S. 349, 353, (1907), citing Hobbes, *Leviathan*, ch.226, 2; Bodin, *Republique*, I, ch.8, ed. 1629, p. 132; Sir John Eliot, *De Jure Maiestrate*, c3; Baldwin, *De Leg. et Const.*, *Digna Vox*, 2nd ed., 1496, fol. 51 b, ed. 1539, fol. 61. See also *American Banana Co. vs. United Fruit Co.*, 213 U. S. 347; John Austin, *Lectures on Jurisprudence*, 5th ed., London, 1911, 2 vols., 1:263, 278; J. C. Gray, *The Nature and Sources of the Law*, N. Y., 1909, pp. 77-81; T. E. Holland, *The Elements of Jurisprudence*, 11th ed., N. Y., 1910, pp. 53, 365; J. W. Salmond, *Jurisprudence*, 2nd Ed., London, 1907, p. 110, 475-481; J. C. Calhoun, *Disquisition on government*, Works, vol. 6, Columbus, 1851, 1:146; J. W. Burgess, *Political Science and Comparative Constitutional Law*, Boston, 1902, 2 vol., 1:53.

that inhabitants of the United States shall not "set on foot military expeditions" when the country is neutral, and that naval forces shall not interfere with neutral commerce in time of war except for breach of blockade, carriage of contraband or similar cause. Municipal law, however, holds the individual criminally liable for setting on foot a military expedition³ and the naval officer liable in damages for making a seizure without probable cause,⁴ while international law in both cases requires the United States to make reparation to the injured states if these acts occur.⁵ We believe therefore that it is possible for municipal law to enforce at least a part of international law so far as the obligations of that state are concerned.

RELATIONSHIP OF INTERNATIONAL AND MUNICIPAL LAW

International law consists of rules prescribing the conduct of persons, agencies of government and states, for breaches of which states are held liable.⁶ This definition is undoubtedly

³Act Apr. 20, 1818, Rev. Stat., sec. 5286.

⁴Little vs. Barreme, 2 Cranch 176, (1804); The Thompson, 3 Wall, 155; The Dashing Wave, 5 Wall. 170. See Moore's Digest, 7; 593-598.

⁵Hague Conventions, 1907, v; art. 4; Declaration of London, 1909, art. 64.

⁶A number of different points of emphasis are made in definitions of international law. All agree that it consists of "rules of conduct regulating the intercourse of states" (Halleck, Int. Law, 3rd ed., 1;46). Many however enlarge this definition in its most limited sense, by emphasizing the fact that international law may prescribe conduct for persons, (Hershey, Int. Law, p. 1; Westlake, Int. Law 1, p. 1; Principles p. 1; Bonfils, Droit Int, pp. 2, 79). Walker, (Science, p. 44) emphasizing this idea, says, "International laws are rules of conduct observed by men toward each other as members of different states though members of the same international circle." Most writers, however, restrict the connotation of the term by requiring that the rules conform to some standard of objectivity. "Actual observance" is frequently considered enough (Bonfils, p. 1; Walker, Science, p. 44). Lawrence (p. 1) and Bonfils (p. 2) require that the rules "determine conduct", Westlake (Prin. p. 1) that they "govern the relations of states", Hershey (p. 1) that they be "binding upon the members of the international community". Exactly how any of these standards can distinguish international law from international morality, it is difficult to see. They are so vague as to be almost meaningless. Hall's insistence that nations must "have consented to be bound" (p. 5) is more definite, while Holland (Studies, p. 194) is even more concrete when he says, "the law of nations * * is the public opinion of the governments of the civilized world with reference to the rights which any state would be

exceedingly vague. It is often difficult to tell whether a state will be held liable for the infraction of a particular rule or not. Often if weak it will, if strong it will not. There is no authoritative tribunal for defining rules of international law and saying for this act of a person or of an officer the state is responsible, for this it is not. The only test is that of actual practice. Where responsibility is habitually acknowledged or, in other words, where the consensus of opinion among nations recognizes that responsibility exists, the rule is one of international law.

Even more vague than the scope of international law is its sanction. The enforcement of the liability of states is not insured by any legal procedure. Such pressure as the inertia of habit, public opinion, commercial or military reprisal, threats of war, etc.,⁷ alone compels states to observe international law, to enforce its observance among their subjects and, within their territory,

justified in vindicating for itself by a resort to arms." Some writers emphasize the idea that international law is not real law. Holland calls it "public opinion", (Studies, p. 194), Austin, "international public morality" (1; 173, 226), Stephen (History of Crim. Law, 2;25) and Gray (Nature and Sources of the Law p. 125) convey a similar idea. It seems to us that such assertions are inappropriate in a definition of international law. Usage has applied the term so consistently that it would seem more proper to enlarge the definition of law so as to include international law. However, such definition may serve the useful purpose of indicating that the sanction of international law is different from that of municipal law, which is the significance given by these writers to the term "law". Our definition is doubtless as open to the criticism of vagueness as any. We make no immediate limitation according to the character of the parties obligated. Any rule of conduct is a rule of international law, if *states are held liable*. This connotative limitation under present conditions implies an exclusion of rules relating to parties of a certain character, for instance those defining relationships between persons of the same state or persons and their own government, because such matters being entirely internal, other states have no interest in exacting a liability. There have, however, been attempts to include *res interna* in international law, for example the principle of legitimacy by the Quadruple Alliance of 1815. If state liability were actually recognized, in such matters, they would become rules of international law. By the phrase "are held liable" we mean to assume an inductive and objective standard, requiring actual practice for the proof of this condition, and also a subjective standard similar to Holland's that opinion must recognize a resort to force as justifiable in enforcing this liability, a condition which is of course incapable of more than very indefinite verification.

⁷See Elihu Root, "The sanctions of International Law", Am. Jour. Int. Law, 2;451 (1908).

to acknowledge their liability and to make adequate reparation for infractions of its precepts.

But although it is difficult to tell what rules are within the field of international law and what sanctions enforce the liability of states, it is easy to state definitely many of the rules themselves and to show how they are actually enforced. This statement appears self-contradictory, yet there are many rules relating to diplomatic intercourse, condemnation of prizes, etc., which are capable of being stated in definite terms and are enforced by definite legal methods. They are also rules of international law; at least states have habitually acknowledged responsibility for their infraction.

For the definite statement and legal enforcement of international law we look to the municipal law of states. Municipal law consists of all general rules which the state enforces.⁸ The most common agents of enforcement are judicial tribunals, but a rule enforced by an authoritative executive or administrative pro-

⁸Writers on general jurisprudence commonly give a similar definition to the term "law". Gray (Nature and Sources of the Law, p. 82) says, "the law of the state * * is composed of the rules which the courts * * lay down for the determination of legal rights and duties." Salmond (Jurisprudence p. 9) says, "The law is the body of principles recognized and applied by the state in the administration of justice". Both of these definitions recognize state enforceability as the most important feature of municipal law. Austin's conception (Lectures on Jurisprudence, I;79, 88) was essentially the same although he emphasized the fact that the state "commanded" law rather than that it enforced it, thus being forced to the awkward explanation that "what the sovereign permits he commands" (2;510) to explain judge-made law. Maine's criticism (Early Hist. of Inst., pp. 377-387) that customary law is neither commanded nor enforced by the sovereign and can not be altered by him, seems to confuse the titular with the real sovereign. If customary law is applied in the village tribunals it is being enforced by the "sovereign" in the sense of political science even though Runjeet Singh, the titular sovereign, does not enforce it and can not alter it. Walker (Science of Int. Law, p. 44) attempts to parallel his definition of municipal with that of international law and says "municipal laws are rules of conduct observed by men or by men recognized as binding toward each other as members of the *same state*". He does not recognize positive state enforceability as necessary and he also limits the connotation of the term to rules between members of the same state. We disagree with him in both of these points. We intend to include as municipal law *all rules* of conduct binding either citizens or aliens, enforced by the state, either through a central or local authority, so long as this authority is recognized as legitimate.

cedure is no less municipal law. The rules of international law, so far as they lay down rights and duties of persons and officers, may be enforced by municipal law either directly through the application of international law by the court and executive officials or indirectly through the coercion of persons and officers in a manner not immediately prescribed by international law but calculated to cause an observance of the international duty.

It is true that they may not be. A state has entire control of its own municipal law and whether or not it chooses to enforce rules of international law, depends upon the force of the international sanctions pressing upon it.⁹ But if it does enforce them, it thereby enforces its own duties under international law, and in so far as this enforcement is effective and complete it escapes liability under international law. It also gives legal definition and sanction to these rules.

It is thus an obligation, imposed by international law itself upon states, to enforce that part of international law relating to the conduct of persons within their jurisdiction, through their municipal jurisprudence.¹⁰ It is for states to supply the lack of a world administration for the execution of international law.

⁹See W. W. Willoughby, *The Legal Nature of Int. Law*, *Am. Jour. Int. Law*, 8;357, in answer to an article of the same title by J. B. Scott, *Am. Jour. Int. Law*, 1;831. Also Westlake, *Is Int. Law part of the Law of England?*, *Law Quar. Rev.*, 22; 1426; Holland, *Studies in Int. Law*, p. 195.

¹⁰See judicial decisions on this subject, *Res Publica vs. DeLongchamps*, 1 Dall. 111; *Talbot vs. Seamens*, 1 Cranch 1, 37 (1801); *Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191; *The Scotia*, 14 Wall. 170, Scott 17; *Hilton vs. Guyot*, 159 U. S. 113; *The Paquete Habana*, 175 U. S. 677, Scott, 19. In *Murray vs. the Charming Betsy*, 2 Cranch 64, the court said that municipal law ought to be interpreted in harmony with international law if possible. English cases—*Triquet vs. Bath*, 3 Burr. 1478, Scott, 6; *Heathfield vs. Chilton*, 4 Burr. 2015, Scott 189; *Le Louis*, 2 Dods. 239, Scott 352; *Emperor of Austria vs. Day*, 2 Giff. 628; *In the Recovery*, 6 Rob. 348, the court even went so far as to assert that prize courts must apply international law in opposition to municipal statutes. This view was not maintained in *West Rand Central Gold Mining Co. vs. Rex*, L. R. 1905, 2 K. B. 391, Bentwich 1, which held that an act of state prevented the application of conflicting rules of international law. *Regina vs. Keyn*, L. R. 2 Ex. 63, Bentwich, 6, held that international law could not operate to increase jurisdiction; and *Mortensen vs. Peters*, 14 Scot. L. T. R. 227 (1906), Bentwich 12, applied a statute extending jurisdiction beyond the limits permitted by international law. See discussion of prize cases on this point, Holland *Studies*, pp. 193-199.

As state courts of the United States enforce the federal constitution, laws and treaties, so it is the duty of independent governments to see that their courts enforce international law and that their executive authorities execute it.

It must not be overlooked that there are rules of international law which are incapable of enforcement as municipal law. Those which prescribe rules of conduct which the state considered as a unit must do or refrain from are directed solely to the sovereign power in the government. The commencement of war, the recognition of foreign states and governments, the submission of questions to arbitration, the acquisition of territory, the extension of jurisdiction are of this character. They are political questions and beyond the power of municipal law to control. The observance of such rules is in the hands of discretionary officers. In the United States congress and the president are responsible for the observance of such rules by the United States and they can not be coerced by municipal regulations. It is true that in these matters the political organs of the government act according to legal precedents as well as dictates of pure policy. But their action in either case is beyond the scope of municipal law and of our subject.

We are concerned with the rules of international law enforced directly as law in the United States and those enforced indirectly by the enforcement of laws supplementary to international law. The precedents and procedure followed by political organs of government in settling these political questions will not, therefore, be considered.

CLASSIFICATION

The doctrine of responsibility of states, which is the essence of international law, presents two possible methods of viewing the matter. We may consider the rule itself of primary importance; and thus private persons, ambassadors, consuls, military forces, naval forces, etc., as well as states would be subjects of international law for whom different rights and obligations are prescribed. On the other hand we may consider the liability or enforcement of the rule as of primary importance; and states, which are alone responsible, as the only subjects of international law. We should then describe the rights and duties of states, with reference to these various classes of officers and persons, considering them as objects of international law.

The latter is the course commonly pursued. States are said

to be the only subjects of international law. Persons and public officers as well as territory and other kinds of property are its objects.¹¹

In our own opinion there is much to be said for the first view. There is a tendency for international law to impose a direct responsibility upon persons and officers¹² and if it is ever to be law in the Austinian sense of the term, this view will have to be recognized. The possibility of an effective law binding states as such was exhaustively discussed in the federal convention of 1787,¹³ and the impossibility of enforcing such a law by ordinary legal processes was demonstrated prior to the civil war. Even corporations when of considerable magnitude have proved surprisingly difficult things to control by law. A corporation or a state can neither be brought to court, nor put in jail. Law can never act upon it more than imperfectly.

As it is, however, the responsibility of states is the predominant feature of international law, and we will adhere to the usual custom of classifying the branches of that subject according to the rights and duties of states.

It is possible to discuss any body of law in terms of either rights or duties; either privileges or obligations; either liberties or restrictions. Every right implies a duty on the part of others

¹¹See Lawrence, *Int. Law*, p. 73, "Probably it is best to say with Oppenheim (*Int. Law*, I; 344) that persons, like territory, are objects of International law, and reserve the term subjects for those artificial persons who are either sovereign states or communities closely akin to them through the possession of some of the distinguishing marks of statehood."

¹²See, for instance, Hague Conventions 1907, in which occur such expressions as "Every prisoner of war is bound to give, etc." (IV, Art. 9) "a belligerent war ship may not prolong its stay, etc." (XIII, Arts. 14, 16, 18, 19, 20).

¹³See James Madison, *The Journal of the Debates in the Convention which framed the Constitution of the United States*, Gaillard Hunt, ed., N. Y., 1908, 2 vol., also in Madison, *Works*, Hunt, ed., vol. 3; Elliot, *Debates*, vol. 5; Farrand, *The records of the Federal Convention of 1787*, New Haven, 1911, Remarks by Madison, May 31, Wilson, June 25, King, July 14. Strong, July 14, says, "The practicability of making laws with coercive sanction for the states as political bodies had been exploded in all hands". See also Madison letter to Jefferson, *Works*, I; 344: *The Federalist*, Nos. 15, 16, 21, P. L. Ford, ed., pp. 87, 90, 91, 97, 123. A. C. McLaughlin, *The Confederation and the Constitution*, *Am. Nation Ser.*, vol. 10, pp. 242, 245. The constitution of the German Empire does provide for the legal coercion of states through a process known as "Federal Execution", but the law of the empire acts directly on individuals.

to expect its observance. Treatises on international law, as on all other departments of law, commonly treat parts of the subject by describing duties, other parts by describing rights. In fields where liberty of action is the rule and restriction the exception, convenience dictates a treatment from the standpoint of duties, while when the reverse is true, when restriction is the rule and liberty of action the exception, a treatment from the standpoint of rights is most conservative of space.

For our purposes, however, a classification based exclusively on duties is necessary. Our purpose is to discover what obligations of international law are enforced by municipal law. We will therefore attempt to cover the whole field of international law from the viewpoint of duties. We will not consider the rights of the United States as such, but only in so far as they imply a duty to respect equivalent rights of other states.

Looking at international law as imposing obligations upon states, some of these obligations require action or abstention on the part of the government, while others require the state to enforce action or abstention on the part of its citizens or public officers. Duties of the first character are considered under four heads, abstention, acquiescence, vindication and reparation, those of the second under the head prevention.

The international obligations of a state differ somewhat according to differences in status caused by the advent of wars. Four general divisions are thus suggested—obligations in time of peace, obligations as a neutral, obligations as a belligerent toward neutrals and obligations as a belligerent toward enemies.

The questions relating to the transition from war to peace, peace to neutrality, etc., as well as to the advent of new states, involve the subject of recognition. This is a political question. Municipal law does not lay down rules saying when states shall be recognized, when belligerency and insurgency exist, and when they cease. In these matters the municipal law of the United States follows the political departments of the government as has been repeatedly affirmed by the courts.¹⁴ It adjusts itself to the new status and recognizes the new condition.

¹⁴Rose vs. Himely, 4 Cranch 241 (1808); Consul of Spain vs. the Conception, Fed. Cas. 3137 (1819); Gelston vs. Hoyt, 3 Wheat. 246, 324 (1818); U. S. vs. Palmer, 3 Wheat. 610 (1818); The Divina Pastora, 4 Wheat. 52; Foster vs. Neilson, 2 Pet. 253, 307; Keene vs. McDonough, 8 Pet. 308; Garcia vs. Lee, 12 Pet. 511; Williams vs. Suffolk Ins. Co., 13 Pet. 415 (1839); Kennet vs. Chambers, 14 How. 38 (1852); The Prize Cases, 2 Black 635; U. S. vs. Yorba, 1 Wall. 412; U. S. vs. Lynde, 11 Wall. 632;

These matters are therefore beyond the scope of our subject. We will take the conditions of peace, war and neutrality for granted and discuss the municipal measures for enforcing national duties in each of these conditions, classifying such duties under the five heads, abstention, acquiescence, prevention, vindication and reparation.

The *Ambrose Light*, 25 Fed. Rep. 408 (1885); *Jones vs. U. S.* 137 U. S. 202 (1890); *The Three Friends*, 166 U. S. 1 (1896); *Underhill vs. Hernandez*, 168 U. S. 250; *Ex Parte Toscano*, 208 Fed. Rep. 938 (1913). English cases—*The Pelican*, Edw. Adm. Appdx. D., *Taylor vs. Barkley*, 2 Sim. 213; *Emperor of Austria vs. Day*, 2 Giff 628; *Republic of Peru vs. Peruvian Guano Co.*, 36 Ch D. 489, 497; *Republic of Peru vs. Dreyfus*, 38 Ch. D. 348, 356, 359.

PART I. OBLIGATIONS IN TIME OF PEACE

CHAPTER I. INTRODUCTORY

The obligations imposed upon states in time of peace are in general derived from one fundamental conception, which may be summarized as the principle of territorial independence or territorial sovereignty.

Modern international law was impossible until the idea that government and jurisdiction are inseparable from territory had received recognition. It is true that these propositions are not universally held now. The principle that jurisdiction extends by race or nationality and by the nature of the act rather than by territory is still asserted and acted upon in claims of jurisdiction over citizens abroad and over any one committing offenses against the state or its citizens. It is, however, believed that these claims are to be regarded as exceptions to the general rule of territorial jurisdiction. The triumph of the theory of territoriality in jurisdiction and government is assured by the fact that power of coercion, physical force, is the foundation of both of them, and effective coercion is by the nature of things exclusive within one territory. We will therefore regard the following propositions as the norms of the law of peace: (1) A state occupies a definite portion of territory. (2) Within that territory it may organize itself, dispose of its land, resources and wealth, and control the conduct of the inhabitants with perfect freedom. This may be stated by saying that within its territory it has unlimited powers of government, property and jurisdiction. (3) Outside of that territory its power ceases.¹

¹On the theory and necessity of territorial sovereignty see J. W. Burgess, *Political Science and Comparative Constitutional Law*, Boston, 1898, 1; 52; Joseph Story, *Commentaries on the Conflict of Laws*, 8th ed., Boston, 1883, pp. 8-9, 21-24; J. W. Salmond, *Jurisprudence*; 2nd ed., London, 1907; p. 99; Justice O. W. Holmes, in *American Banana Co. vs. United Fruit Co.*, 213 U. S. 347 (1909); W. E. Hall, *International Law*, 4th ed., London, 1895, pp. 20-21, 45-46. J. E. Feraud-Giraud, *Etats et Souverains devant les tribunaux étrangers*, Paris, 1895, 1; 31-36 discusses the necessary exemption of states from foreign jurisdiction.

These conditions are in fact imaginary. They could in completeness be realized only if all states were as isolated as the planets. This not being true, they are subject to numerous exceptions, necessitated by the inevitable peaceful intercourse of states and their subjects, and the necessary concurrent extension of authority by all states over the high seas, which are within the territory of no state, and which by physical facts can not be so appropriated. States better than human individuals accord with Herbert Spencer's theory of liberty,² but even in their case we must modify this absolute right of liberty by the proviso that a like liberty be accorded to others.

It is the determination of these exceptions to the ideal condition of absolute territorial independence which forms the body of the law of peace. Were there no exceptions, obviously there would be no more need for law regulating relations between states than there is for law regulating relations between the inhabitants of the earth and the inhabitants of Mars. Consisting of rules governing exceptions to the general rule, the law is ordinarily expressed in terms of rights. Thus we speak of the state's right to a limited jurisdiction over its subjects abroad, and over its merchant vessels on the high seas, and its exclusive right of jurisdiction over its ambassadors, public vessels and armed forces abroad. We propose, however, to look at the matter from the reverse side of duties. We are not interested in the laws of the United States providing for the exercise of rights as such; but as they indicate the limits of these rights, and imply an obligation of the United States not to exceed them.

The obligations of states under international law may be classified under five heads: (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5) reparation. A state is under the obligation to *abstain*, with a few exceptions, from the exercise of authority outside of its territory, to *acquiesce* in the exercise, within its territory, of authority by foreign states in a few cases, to *prevent* its citizens and public officers from doing acts injurious to foreign states and their subjects, to *vindicate* its sovereignty and position in the family of nations by treating violations of international law by foreign persons or officers in a manner prescribed by international law, and to make *reparation* for breaches of international law by its citizens or public officers.

²Herbert Spencer, *Social Statics*, together with *Man versus the State*, New York, 1910, p. 36.

CHAPTER II. OBLIGATIONS OF ABSTENTION

INTRODUCTORY

The obligations of abstention are derived from the fundamental principles of international law. The state is bound to abstain from the exercise of sovereignty and jurisdiction over acts or persons in any but its own territory, with a few exceptions. These duties relate primarily to the conduct of the government. If the government chooses to ignore them by sovereign acts such as intervention or conquest, municipal law can have no restraining effect. Statutes, treaties, and court decisions, have, however, expressed legal limitations upon the extension of power outside of the territory, and, until changed by a sovereign act, are laws enforcing the duty of abstention as against the government. By their mere statement as law, these limitations tend to be observed by the sovereign power, and, of course, may be enforced by coercive measures as against inferior officers of government.

The obligations of abstention may be considered under the three heads, (1) acquisition of territory, (2) use of force against foreign states or their subjects, (3) exercise of jurisdiction outside of the territorial limits.

ACQUISITION OF TERRITORY

(1) The right to acquire unoccupied territory or territory occupied only by savages is generally recognized by international law and has been affirmed by the law of the United States. In the Declaration of the Berlin congress of 1885 it was provided that territory in Africa should only be acquired with effective title after notification and actual occupation. The United States signed this declaration, but as it was not submitted to the senate for ratification it is not a binding treaty.¹ The claims of the Indians to territory has been held to be no bar to the rights of acquisition by civilized nations through discovery and occupation, in a number of cases.² The acquisition of unoccupied guano islands by action of citizens of the United States was provided

¹See Moore's Digest 1;267.

²Johnson vs. McIntosh, 8 Wheat. 543 (1823); Martin vs. Waddell, 16 Pet. 367; Mortimer vs. N. Y. Elevated R. R. Co., 6 N. Y. S. 89 (1889); Ketchum vs. Buckley, 99 U. S. 188.

for by statute in 1856,³ under conditions designed to prevent such acquisition of islands already under the sovereignty of foreign states, but the fact that another government had formerly occupied an island and subsequently abandoned it was held no bar to its acquisition under this act.⁴

(2) The acquisition of land by accretion, or the gradual and imperceptible building up of territory by rivers or ocean tides has been upheld as conferring legitimate title by the United States courts in the case of private owners and states of the union,⁵ a view which implies an acquisition of sovereignty over such accretions by the United States. This method of acquisition was supported in an English case which acknowledged the sovereignty of the United States over mud islands formed near the mouth of the Mississippi.⁶

(3) Prescription has been held to confer good title to territory claimed by states,⁷ and by individuals as against the government.⁸ It has also been impliedly recognized as founding good title in various boundary treaties of the United States.⁹

(4) The acquisition of land by conquest was denounced in resolutions proposed at the International American congress in Washington, 1889-1890, which stated "that the principle of conquest shall not, during the continuance of this treaty of arbitration, be recognized as admissible under American Public Law."¹⁰ The United States acceded to the resolution, but as the plan of

³Act. Aug. 5, 1856, Rev. Stat. 5570-5578.

⁴Jones vs. U. S. 137 U. S. 202, 220, (1890). See Moore's Digest, 1:299, 556-580.

⁵Ocean City Association vs. Schwer, 46 Atl. Rep. 690, (N. Y. 1900); Mulry vs. Norton, 100 N. Y. 424; Wallace vs. Driver, 61 Ark. 429; Jeffries vs. East Omaha Land Co., 134 U. S. 178, 191, (1890); St. Louis vs. Rutz, 138 U. S. 226, (1891); Nebraska vs. Iowa, 143 U. S. 359, 368, (1892).

⁶The Anna, 5 Rob. 373. (1805). See Moore's Digest, 1:269-273.

⁷Rhode Island, vs. Mass., 4 How. 591, 639, (1846); Handly's Lessee vs. Anthony, 5 Wheat. 378, (1820); Indiana vs. Ky., 136 U. S. 479, (1890); 159 U. S. 275, (1895); 163 U. S. 520, (1897), 167 U. S. 270.

⁸U. S. vs. Chavez, 175 U. S. 509, 522, (1899); Peabody vs. U. S. 175 U. S. 546; Chavez vs. U. S. 175 U. S. 552.

⁹Treaty with Great Britain, 1818, art. 3, Malloy p. 632; 1827, art. 1, p. 644. See also treaty between Great Britain and Venezuela, 1897, adopted as a basis of the boundary arbitration demanded by the United States, Art. 4 affirmed that fifty years prescription gave good title. See Moore's Digest, 1:293.

¹⁰See Moore's Digest, 1:292: 7;318.

arbitration upon which it was contingent did not become effective, the resolution did not become law. The courts have held that under the constitution congress has no power to declare wars for conquest and the president to wage them for that purpose, hence the United States can not acquire new territory by conquest.¹¹ Territory under military government or occupation is, therefore, not territory of the United States for purposes of internal administration. This interpretation of constitutional law is, however, no guarantee against the seizure of foreign territory by conquest, for the courts will recognize a forced cession or sale of territory concluded by treaty and they have specifically held that acquisition by conquest is proper by international law, even though prohibited by the law of the United States.¹²

(5) Acquisition of territory by treaty, whether from forced cession, desire of the population, or purchase has been upheld as inherent in the treaty making power of the government,¹³ and has been the usual means by which the United States has acquired territory.¹⁴

The law of the United States thus permits of acquisitions of territory by occupation, accretion, prescription, and treaty, while it requires the government to abstain from acquiring land by conquest. The question is, however, a political rather than a legal question, and so the courts have held.¹⁵ If the political department of government indicates by suitable evidence that it regards new territory as acquired, the courts will follow it. The duty to abstain from acquiring land occupied by other states is, therefore, one left to the discretion of the political department

¹¹Flemming vs. Page, 9 How. 603, (1849). Contra see *Am. Ins. Co., vs. Canter*, 1 Pet. 511, (1828). See Self-Denying Ordinance in reference to Cuba. Apr. 20, 1898. 30 stat. 739 sec. 4.

¹²On this subject see *Flemming vs. Page* 9, How. 603, (1849); *U. S. vs. Hayward*, 2 Gall. 485; *U. S. vs. Rice*, 4 Wheat. 246; *Moore's Digest*, 1:290: 7:257-265, 315. *Neely vs. Henkel* 180 U. S. 109, 119-170 (1900) *Moore's Digest* 1:535.

¹³See Chief Justice Marshall, in *Am. Ins. Co. vs. Canter*, 1 Pet. 511, (1828).

¹⁴Treaties with France 1803, Malloy p. 508, ceding La.; Spain 1819, p. 1651, ceding Fla.; Mexico, 1848, p. 1107, 1853, p. 1121, ceding southwestern territory; Russia, 1867, p. 1521, ceding Alaska, Spain, 1898, p. 1690, ceding Philippines and Porto Rico, Panama, 1903, p. 1351, granting Canal Zone. See also Joint Resolutions of Congress, Mch. 1, 1845, 5 stat. 797; Dec. 29, 1845, 9 stat. 108, admitting Texas to the Union, and July 7, 1898, incorporating Hawaii.

¹⁵*Jones vs. U. S.*, 137 U. S. 202, (1890); *Foster vs. Neilson*, 2 Pet. 253.

of the government, and is beyond the power of municipal law to control.

USE OF FORCE AGAINST FOREIGN STATES OR THEIR SUBJECTS

The use of force may be resorted to (1) against a foreign state itself, as in intervention, war or general reprisals; (2) against subjects of a foreign state by way of special reprisals, or (3) against foreigners for breaches of municipal law. The use of force against aliens within the territorial jurisdiction in the usual process of enforcing municipal law may unquestionably be exercised, and gives rise to no duty of abstention. The law of peace, however, requires a government to abstain from using force against foreign states or their subjects outside of its territory.

Such a use of force against the foreign state or within its territory is known as intervention. In treaties with Cuba and Panama the United States has been specifically given the right to intervene.¹⁶

(1) The Hague convention relating to the pacific settlement of international disputes, which recommends mediation, commissions of inquiry and arbitration in cases of disagreement,¹⁷ as well as numerous individual arbitration treaties,¹⁸ recognizes the duty to abstain from the use of force against foreign states. Another of the Hague conventions¹⁹ requires the United States to abstain from the use of armed force for the collection of contract debts. These treaties have been ratified and are law in the United States, but they are addressed to the political department of the government. The courts in applying the law will recognize sovereign acts of force even when prohibited by treaty. No power of municipal law can compel resort to arbitration or prohibit intervention or a resort to arms, but the definite statement in treaties of an obligation to abstain from the use of armed forces

¹⁶Treaty with Cuba, 1903, Malloy, p. 362, permits intervention to preserve independence, and with Panama, 1903, art. 23, p. 1356, to protect the canal.

¹⁷Hague conventions, 1899, i; 1907, i.

¹⁸There are two kinds of individual arbitration treaties; special, relating to the arbitration of specified claims alone, as the treaty of Washington with Great Britain, of 1871; and general, requiring arbitration of all questions of a certain class. Conventions of the latter class were concluded with a large number of powers in 1908 to last for five years, recourse to the Hague court being provided for.

¹⁹Hague conventions, 1907, ii.

undoubtedly, in itself, offers a sanction to the observance of this duty by the political authorities of government. The constitutional provision giving congress alone power to declare war appears also to prevent a hasty resort to arms. Experience has, however, demonstrated that the executive can create a situation from which congress can not recede.²⁰ The use of force in cases not amounting to war, such as naval demonstration, or the employment of armed forces to protect embassies in time of insurrection, has generally been authorized by congress. Such action is not, however, required by law. A number of cases have occurred, notably the Boxer uprising in China, when armed force was used without express authorization, and its use subsequently ratified by congress.²¹

The use of force on foreign territory to suppress marauders and pirates and prevent maltreatment of citizens has been justified on the grounds of self defense. Thus Jackson's invasion of Florida in 1819, and various invasions of Mexican territory in pursuit of marauding Indians; the occupation of Amelia island by United States forces in 1817 to suppress a nest of pirates; the landing of troops in Vera Cruz, Mexico, 1914, and Peking, China, 1899; and the bombardment of Greytown, Nicaragua in 1854 to protect American citizens were justified by the political department of the United States government on this basis. Great Britain in the same manner attempted to justify the seizure in American waters and destruction of the *Caroline*, in 1837, against the vigorous protest of the United States.²²

The determination of circumstances warranting intervention in self defense is in any case a political question and forms an exception to the general rule of international law that the state must abstain from the use of force on foreign territory. This general rule of abstention is recognized and enforced by United States law. In the Navy Regulations, the use of force in territorial waters and landing of armed troops, without express permission of the local authorities, is forbidden. Military law also requires strict respect for foreign territory.²³ Instructions of the

²⁰As in the Mexican war.

²¹See Moore's Digest, 7;109-118, Navy regulations, 1913, sec. 1647.

²²For discussion of these and other cases relating to self defense as a justification for the violation of foreign territory, see Moore's Digest, 2;400-425.

²³Navy Regulations, 1913, Sec. 1645-1648. Army Regulations, 1913, Sec. 89, ch. 3, Dig. op. judge Ad. Gen. 1912, p. 90. Moore's Digest, 2;364. For similar duties in time of war toward neutrals, see *infra* p. 212 et seq.

Department of State further aid in the performance of this duty. In 1887 instructions to a *Chargé d'affaire* in Peru said, "It is always expected that the agents of the department abroad will exercise extreme caution in summoning war vessels to their aid at critical junctures, especially if there be no practical purpose to be subserved by their presence."²⁴ The courts have affirmed this view in dicta. Where a seizure under the non-intercourse act was made in foreign territorial waters the court said, "it is certainly an offense against the power which must be adjudicated between the two governments,"²⁵ and where a naval officer entered foreign territory to recover piratically seized property of American citizens it held²⁶ that he acted beyond his right, but in both of these cases the foreign government's claim was held to be subject to diplomatic settlement only. Municipal law could offer no relief. Where special permission to pursue marauders on foreign territory or to preserve order is given by treaty, as is the case in several Mexican agreements and treaties with Cuba and Panama, no duty of abstention is involved.²⁷

In the present state of the law the enforcement of the duty to abstain from intervention and the use of force on foreign territory belongs primarily to the executive through its control of military and naval forces and diplomatic officers, as well as of the general conduct of foreign relations. Judicial authorities may add their sanction by the enforcement of the usual principles of administrative and military law. Violations of the international obligation, specifically authorized by the political departments of government, are, however, beyond the power of municipal law to control.

(2) Reprisals may be divided into four classes: public and private general reprisals, public and private special reprisals. General reprisal is the right to seize any property of a foreign

²⁴Mr. Bayard, Secretary of State, to Mr. Neal, *Chargé*, Nov. 16, 1887; see Moore's Digest 7;109. See also Consular Regulations, 1896, Sec. 113.

²⁵*Ship Richmond vs. U. S.*, 9 Cranch 102, 104, (1815) See also the *Itata* 1892, Moore, *Int. Arb.* pp. 3067-3071.

²⁶*Davisson vs. Sealskins*, 2 Paine 324. See also Nelson, *Att. Gen.*, 4 op. 285 (1843); Black, *Att. Gen.* 9 op. 286, (1859); Moore's Digest, 1;362-365.

²⁷*Protocols with Mexico*, 1882, 1883, 1884, 1885, 1890, 1892, 1896, Malloy pp. 1144-1177. Most of them were to be in force one year, but that of 1896 specified that it should last until Kid's band of Indians be exterminated or pacified. See also treaty with Cuba, 1903, p. 362; Panama, 1903, art. 23, p. 1356; Nicaragua, 1867, art. 15-17, p. 1285.

state or its citizens on the sea, and is equivalent to a state of war, although in the trouble with France in 1798-1799 general reprisals were authorized by congress²⁸ without an express declaration of war. The courts, however, held that war actually existed.²⁹ By the abolition of privateering, private general reprisals are no longer permitted. Public general reprisals are still resorted to but are considered in the chapters devoted to obligations in time of war.

By private special reprisals, persons wronged by a foreign state were formerly permitted by commission of their sovereign to indemnify themselves by seizing property belonging to any subject of that state on the high seas in time of peace. This practice would amount to an aggravated form of privateering and would now be regarded as little short of piracy. The legitimacy of the practice seems to be admitted by the constitutional provision giving congress power to grant letters of marque and reprisal, though it was denied by Attorney General Randolph in an opinion in 1793. At present the practice is undoubtedly obsolete.³⁰ The only question therefore which concerns us here is that of public special reprisals. Under this right the seizure of vessels on the high seas or in the jurisdiction of their own state through such institutions as pacific blockade is generally considered legitimate by writers on international law. As the United States has not resorted to reprisals in time of peace, except in the case of France in 1799 which the courts regarded as war, the courts have had no opportunity to pass upon the legitimacy of seizures by way of reprisal, but they would undoubtedly be bound by any act of the political department of the government in this respect. The power to make war would probably be held to include a power to resort to lesser acts of violence.

(3) The duty to abstain from the use of force outside of the territory of the United States against foreign vessels guilty of infractions of local law, has not been universally maintained by the law of the United States. An act of 1797³¹ still in force authorizes revenue officers to board foreign vessels four leagues from the coast; and in *Church vs. Hubbard*³² Chief Justice Mar-

²⁸May 28, 1798, 1 stat. 361; July 9, 1798, 1 stat. 578; Mch. 3, 1799, 1 stat. 743.

²⁹*Bas. vs. Tingey*, 4 Dall. 37, (1800); *Talbot vs. Seaman*, 1 Cranch 1, 282, (1801); *Moore's Digest*, 7;155-153.

³⁰*Randolph, Att. Gen.* 1 op. 30, see *Moore's Digest*, 7;119.

³¹Act. Mch. 2, 1797, Sec. 27, rev. stat. 2760; *Moore's Digest*, 1;725.

³²*Church vs. Hubbard*, 2 Cranch 187; *Scott*, 343.

shall uphold the right to make seizures on the high sea for breaches of municipal regulations in a case involving such a seizure by Brazil; but, a few years later, in *Rose vs. Himely*,³³ changed his mind, and denied the validity of such seizures. The embargo and non-intercourse acts of the early nineteenth century did not permit the seizure of foreign vessels outside of territorial jurisdiction. The rule laid down by Lord Stowell in *Le Louis*,³⁴ that visit, search and seizure of foreign vessels beyond territorial jurisdiction is not permitted in time of peace, was followed by Chief Justice Marshall in *The Antelope*,³⁵ and appears to be the usual law of the United States. Exceptions to this statement are found in the provisions of treaties authorizing the seizure in restricted zones of slave traders flying foreign flags, and the universally acknowledged right of seizing pirate vessels. These subjects will be discussed in considering the exercise of jurisdiction over the high seas. Cases have affirmed that unequivocal acts of the sovereign authorizing seizures beyond the three mile limit would be obligatory, though such acts should if possible be interpreted to accord with international law.³⁶ Nevertheless, in the Alaskan seal fishery dispute of 1886 British sealing vessels were seized sixty miles from shore and their seizure justified by courts under a statute which by no means unequivocally authorized such acts.³⁷ The attitude taken by the courts, however, was that the territorial jurisdiction of the United States extended one hundred Italian miles from the shore; the question will therefore be adverted to in considering the extent of jurisdiction.

While the duty to abstain from the use of force against foreign vessels on the high seas in time of peace is primarily to be controlled by executive authority, yet by the rule requiring legal

³³*Rose vs. Himely*, 4 Cranch 241, (1808), see also *Hudson vs. Guies-tier*, 6 Cranch 281, (1810); *The Appollon*, 9 Wheat. 362, (1824). In the *Itata*, 1892, Moore's Int. Arb., p. 3067-3071, the U. S. was held liable in damages for a seizure in Chilean waters, see Scott, cases note p. 344. Similar view was held by the U. S. supreme court in the *Ship Richmond vs. U. S.* 9 Cranch 102, 104 (1815). Moore's Digest, 2;364.

³⁴*Le Louis*, 2 Dods. 210, (1817).

³⁵*The Antelope*, 10 Wheat. 66, (1825).

³⁶*Murray vs. The Charming Betsy*, 2 Cranch 64, (1804), which held that the non-intercourse act should not be interpreted as authorizing the seizure of foreign vessels on the high seas or prohibiting the sale of national vessels to foreign countries.

³⁷See Moore's Digest, 1;895.

adjudication of all seizures courts may add their sanction to the enforcement of this duty.

EXERCISE OF EXTRA-TERRITORIAL JURISDICTION

The final duty of abstention requires a state to refrain from exercising jurisdiction beyond its territory, with a few exceptions. For convenience we may consider the matter under the four heads: (1) extent of territory, (2) jurisdiction over the high seas, (3) jurisdiction over acts committed in foreign countries and (4) jurisdiction over suits against foreign states.

(1) Where the territory of the United States is adjacent to that of foreign states, the boundary has in most cases been defined by treaties which are binding upon the courts in assuming jurisdiction of cases.³⁸ In the absence of treaty stipulations river boundaries have been held to exist in the middle of the main current.³⁹ In the case of international rivers, however, a number of treaties have provided that the jurisdiction is subject to the right of free navigation by vessels of all nations,⁴⁰ and the courts have maintained this position, holding that a foreign vessel could not be seized for violation of local laws while passing through American waters of an international river, en route to a foreign port.⁴¹ The same freedom of navigation is permitted upon the Great Lakes by treaties with Great Britain.⁴²

The extent of territorial jurisdiction on the sea for exclusive fishing privileges was fixed at the three mile limit in the treaty

³⁸Cushing Att. Gen. 8 op., 175; U. S. vs. Texas, 162 U. S. 1, (1896).

³⁹Handly vs. Anthony, 5 Wheat. 374; Ala. vs. Ga., 25 How. 505; Iowa vs. Ill., 147 U. S. 1, (1893). Moore's Digest, 1:615-621.

⁴⁰See Treaties with Great Britain, 1783, Art. 8, p. 589. Art. 3, Malloy, p. 643; 1846, Art. 2, p. 657; 1854-1866, Art. 4, p. 671, Art. 26, p. 711 decreeing free navigation in the Mississippi, St. Lawrence, St. John, Yukon, Stikine, and Porcupine. With Mexico, 1848, Art. 6, 7, p. 1111; 1853, Art. 4, p. 1123, decreeing free navigation in the Colorado, Gila, and Bravo. In a treaty with Bolivia in 1850, Art. 26, p. 122, it is stated that "in accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata * * opened by nature for the commerce of all nations" and in that with Argentine Republic of 1853, Art. 6, p. 19, the Parana and Uruguay are declared free to commerce even in time of war, with the exception of contraband.

⁴¹The Appollon, 9 Wheat. 362, (1824).

⁴²Treaty with Great Britain, 1871, art. 28, 30, Malloy, p. 711; 1842, art. 2, p. 652; 1854-1866, art. 4, p. 671.

of 1818 with Great Britain.⁴³ In treaties with Mexico, however, the boundary between the two countries was stated to begin three marine leagues or nine miles from land in the Gulf of Mexico,⁴⁴ and an act of 1797⁴⁵ still in force authorizes revenue officers to board foreign vessels four leagues from shore. The whole of bays with headlands two leagues apart or even more have been held by statute, official opinions and judicial decisions to be entirely within territorial jurisdiction.⁴⁶

By an act of 1868⁴⁷ the killing of fur seal "within the limits of Alaskan Territory or in the waters thereof" was prohibited. Vessels engaged in such business were declared forfeitable and their officers and crew liable to criminal punishment. In 1886 the United States District court of Alaska⁴⁸ held a number of seizures of British vessels by revenue cutters, sixty miles from shore, valid under this statute. It reached this decision by applying the meaning of Alaskan territorial waters given in a Russian Ukase of 1821, which it held was the meaning adopted by the political department of the United States government. This Ukase had declared the territorial jurisdiction of Russia to extend one hundred Italian miles from the shore, and the United States claimed to have purchased this jurisdiction with the territory in 1867. The vessels were condemned and the officers held liable to criminal punishment. Upon Great Britain's protest the vessels and men were released and orders sent to Alaska to discontinue pending proceedings. Nevertheless in 1887 and 1889 other vessels were condemned by the same court. The act of 1868 was amended in 1889,⁴⁹ the country's jurisdiction being extended "to all the dominions of the United States in Behring Sea". In an arbitration of the question in

⁴³Treaty with Great Britain, 1818, art 1, Malloy, p. 631.

⁴⁴Treaty with Mexico, 1848, art. 5, Malloy, p. 1109; 1853, art. 1, p. 1122.

⁴⁵Act. Mch. 2, 1797, sec. 27; rev. stat. 2760, See Moore's Digest, 1;725.

⁴⁶For Delaware Bay, see Randolph, Att. Gen., 1 op. 321, Moore's Digest, 1;735; Chesapeake Bay, Stetson vs. U. S., Moore, Int. Arb., 4; 4337-4341; Moore's Digest, 1: 741; Buzzard's Bay, Public Acts Mass., ch. 1, sec. 12, (1890); Commonwealth vs. Manchester, 152 Mass. 230, (1890), affirmed Manchester vs. Mass., 139 U. S. 240.

⁴⁷Act June 27, 1868, Rev. Stat. 1856.

⁴⁸See U. S. vs. La Ninfa, 49 Fed. Rep. 575, (1891); U. S. vs. the James G. Swan, 20 Fed. Rep. 108; U. S. vs. The Alexander, 60 Fed. Rep. 914.

⁴⁹Act. Mch. 2, 1899, 25 Stat. 1009.

1892 the United States' claim of jurisdiction was denied; thus "the dominions of the United States in Behring Sea" were held in subsequent cases to extend only to the three mile limit.⁵⁰

It is evident that the attitude taken by the United States on the limits of territorial jurisdiction has been by no means uniform. The courts have held that the determination of the matter either as to boundary or jurisdiction over the sea is a political question, and that they are bound to follow the view of the political department of the government.⁵¹ Nevertheless the interpretation of political acts bearing on these points often involves questions of legal definition, and the courts undoubtedly may exercise an effective authority in enforcing the country's duty of abstaining from the exercise of jurisdiction outside of its territory, by refusing to take cognizance of cases, where, according to international law, or national acts interpreted according to international law, the national jurisdiction does not extend. In such cases, therefore, the courts may apply rules of international law directly as rules of decision.

(2) The exercise of jurisdiction over vessels of foreign nations seized on the high seas in time of war, by way of reprisals or when ordered by municipal law, has been considered. The general principle appears to be recognized that in time of peace no jurisdiction may be exercised over vessels of foreign states

⁵⁰On the arbitration see Moore's Digest, 1;913-922. As a result of the arbitration the United States paid Great Britain \$473,151.26 as indemnity for the seizures. Judicial discussions subsequent to the arbitration: see *The Alexander*, 75 Fed. Rep. 519, *Pacific Trading Co., vs. U. S.*, 75 Fed. Rep. 519; *La Ninfa*, 75 Fed. Rep. 513, reversing 49 Fed. Rep. 575; *Whitelaw vs. U. S.* 75 Fed. Rep. 513. The Behring Sea controversy is discussed at length in Moore's Digest, 1;890-929, and Freeman Snow, *Treaties and Topics in American Diplomacy*, Boston, 1894, pp. 471-509.

⁵¹*Foster vs. Neilson*, 2 Pet. 253; *Garcia vs. Lee*, 12 Pet. 511; *U. S. vs. Reynes*, 9 How. 127; *Williams vs. Suffolk Ins. Co.*, 13 Pet. 415; *In re Cooper*, 143 U. S. 472, 502-505, (1892); *Jones vs. U. S.* 137 U. S. 202, 212, (1890); *U. S. vs. Texas*, 143 U. S. 621, 629, (1892). See *British case Regina vs. Keyn* L. R. 2 Ex. D. 63, (1876) *Scott* 154, in which criminal jurisdiction on vessels within three mile limit was refused in the absence of specific authorization by the political dept. of govt. Soon after this decision, the *Territorial Water Jurisdiction, Act. 1878*, 41-2 Vict. c. 73 gave such jurisdiction. In *Mortensen vs. Peters*, 14 Scot. L. T. R. 227 (1906), *Bentwich cases*, 12, the court held that it was bound to accept the jurisdiction given it by statute over offenses committed beyond the three mile limit by foreign vessels.

on the high seas. The law of the United States does, however, provide for the assumption of jurisdiction over pirate vessels, slave traders, and national vessels upon the high seas.

(a) Jurisdiction over pirates was given by the crimes act of 1790⁵² enacted under the constitutional authority of congress to "define and punish piracies and offences against the law of nations." Besides persons "piratically running away" with vessels or goods worth over fifty dollars on the high seas, the act declared all persons guilty of acts punishable by death if committed in the United States, or of other specified offenses, pirates, and punishable by death. The courts distinguished two classes of offenses in this act: (1) piracy by international law and (2) piracy by national law. It was only for the former offense that the courts could assume jurisdiction of acts committed on foreign vessels.⁵³ In the latter class of offenses, jurisdiction was only assumed where the offense was committed on a United States vessel or by a United States citizen.⁵⁴

An act of 1819⁵⁵ amended this act, so as to make "piracy as defined by the law of nations" punishable by death, and piratical vessels subject to forfeiture. The act was practically repeated in 1820,⁵⁶ and appears in the revised statutes as section 5368. It was repeated in the penal code of 1911, the death penalty having been changed to life imprisonment by an act of 1897.⁵⁷ The definition of piracy dependent upon the meaning of that term by the law of nations was held sufficiently definite to give criminal jurisdiction.⁵⁸

Persons holding commissions from recognized belligerents, even though not recognized as independent states, can not be considered pirates⁵⁹ and, although opinions have differed, the weight of authority holds that the vessels of unrecognized insur-

⁵²Act. Apr. 3, 1790, 1 stat. 113.

⁵³U. S. vs. Klintock, 5 Wheat. 144, (1820); U. S. vs. Pirates, 5 Wheat. 184.

⁵⁴U. S. vs. Palmer, 3 Wheat. 610, (1818); U. S. vs. Holmes, 5 Wheat. 412, (1820).

⁵⁵Act. Mch. 3, 1819, 3 stat. 513.

⁵⁶May 15, 1820. 3 stat. 600; Rev. Stat. 5368.

⁵⁷Penal Code 1911, sec. 290, Act. Jan. 15, 1897, 29 Stat. 487.

⁵⁸U. S. vs. Smith, 5 Wheat. 153, (1820).

⁵⁹The Nuestra Senora de la Caridad, 4 Wheat. 497; The Santissima Trinidad, 7 Wheat. 283; The Estrella, 4 Wheat. 298; Ford vs. Surget, 97 U. S. 618; U. S. vs. Baker, 5 Blatch, 11, 13.

gents may not be treated as pirates.⁶⁰ Foreign vessels have been held forfeitable for piratical aggressions though the voyage was not primarily one of piracy,⁶¹ and seizure of innocent vessels on probable suspicion of piracy exempts the captor from liability for damages.⁶²

Property seized by pirates has been restored on payment of salvage in the same manner, as in the case of the recapture of prizes during war, though there is no limit to the time during which restoration is possible, as seizure by pirates never divests the original owner of his title.⁶³ A number of treaties have required such restoration.⁶⁴

Treaties have provided that American citizens accepting commissions against the other contracting party should be treated as pirates. There has been doubt whether such treaty provisions are valid because of the impliedly exclusive power given by the constitution to congress to "define piracies."⁶⁵ There have been no criminal prosecutions under such treaties. The act is not one of piracy by international law and therefore could apply only to United States citizens.

(b) Slave trading by United States citizens was made a crime by an act of 1807,⁶⁶ and denounced as piracy by a statute of 1820;⁶⁷ in this case, however, the crime was not one of piracy by international law. In the early half of the nineteenth century, the United States strenuously opposed Great Britain's claims to visit and search foreign vessels suspected of slave trading, and to punish them as pirates. The practice was continued during the Napoleonic wars,⁶⁸ but Lord Stowell by a decision

⁶⁰The *Three Friends*, 166 U. S. 1, 63, (1897), U. S. vs. the *Itata*, 56 Fed. Rep. 505; U. S. vs. The *Weed*, 5 Wall. 62; The *Watchful*, 6 Wall. 91. Contra see The *Ambrose Light*, 25 Fed. Rep. 408, (1885), Navy Regulations, 1885, ch. 20, par. 18. See Moore's Digest, 2; 1097.

⁶¹U. S. vs. The *Malek Adhel*, 2 How. 210.

⁶²The *Marianna Flora*, 11 Wheat. 1; The *Palmyra*, 12 Wheat. 1.

⁶³Wirt, Att. Gen., 1 op. 584, (1822).

⁶⁴See Treaty with Spain, 1795, art. 9, p. 1643; U. S. vs. The *Amistad*, 15 Pet. 518.

⁶⁵The *Bello Corrunes*, 6 Wheat. 152; Letter by Sec. of State Marcy, referring to a proposed treaty with Venezuela of this character, Moore's Digest, 2; 978.

⁶⁶Act. Mch. 2, 1807, 2 stat. 420, sec. 7.

⁶⁷Act May 15, 1820, 3 stat. 600, Rev. stat. 5375.

⁶⁸The *Amedie*, 1 Act. 240, (1810); The *Fortuna*, 1 Dods. 81, (1811); The *Diana*, 1 Dods. 95, (1813). The view was held in these cases that foreign vessels seized during war would not be restored if engaged in slave trading.

in 1817⁶⁹ refused to recognize these claims as valid in time of peace, and his view was followed by Chief Justice Marshall in 1825;⁷⁰ consequently the "pirates" from slave trading were only subject to United States jurisdiction when in domestic vessels.

The treaty of Ghent with Great Britain in 1814⁷¹ expressed the hope that both countries would endeavor to suppress the slave trade, and in the Webster-Ashburton treaty of 1842⁷² the United States agreed to maintain a squadron on the West African coast to act in cooperation with a like English squadron, each of them, however, to seize only vessels flying its own flag.

Great Britain definitely renounced her claim to visit and search foreign suspected vessels in 1858, and at the same time the United States senate by a resolution denounced the "visit, molestation, and detention" of United States vessels by force by foreign powers "as a derogation of the sovereignty of the United States."⁷³ A treaty with Great Britain of 1862⁷⁴ provided for the mutual patrol of a conventional zone extending two hundred miles from the African coast, and the seizure of slave traders, to be tried in three mixed courts at Sierre Leone, Cape of Good Hope, and New York. In 1870⁷⁵ the mixed courts were abolished by treaty, the same provisions applying to national courts of the two countries. By the general act for the repression of African Slave Trade⁷⁶ of 1890, which is a treaty ratified by the United States and sixteen other powers, the visit, search and seizure of vessels of signatory powers under five hundred tons burden, by war vessels of any of the signatory powers, are permitted in a prescribed zone about Africa. Suspected vessels are to be sequestered and their officers and crew turned over to the country under whose flag they sailed. Slave trading by this convention has been put on a footing resembling that of piracy, though not exactly the same. Visit and search may only be exercised against foreign vessels in the limited zone, and trial is always by the country of the suspected parties.⁷⁷

⁶⁹Le Louis, 2 Dods. 210, (1817).

⁷⁰The Antelope, 10 Wheat. 66, (1825).

⁷¹Treaty with Great Britain, 1814, art. 10, Malloy, p. 618.

⁷²Treaty with Great Britain, 1842, art. 8, Malloy, p. 655.

⁷³Moore's Digest, 2;946.

⁷⁴Treaty with Great Britain, 1862, Malloy, p. 674.

⁷⁵Treaty with Great Britain, 1870, Malloy, p. 693.

⁷⁶General Act for the Repression of African Slave Trade, 1890, Malloy, p. 1964.

⁷⁷On the Slave Trade see Moore's Digest, 2;914-951.

(c) Jurisdiction over civil cases involving merchant vessels on the high seas is inherent in the admiralty jurisdiction given to federal courts by the constitution and by the judiciary act of 1789. Cognizance of crimes committed on board national vessels is not, however, inherent in the admiralty jurisdiction,⁷⁸ but, by statute, courts of admiralty are given jurisdiction over offenses on United States vessels at sea, even when committed by foreigners.⁷⁹ The acts specified as piracy by national law come under this head. The criminal jurisdiction over vessels is not co-extensive with the civil admiralty jurisdiction. The latter has been held to extend over the high seas to tide water mark and in rivers so far as the ebb and flow of the tide, in the United States having been extended over the Great Lakes and all navigable streams.⁸⁰ The criminal jurisdiction, however, extends only over United States vessels on the high seas beyond territorial limits. Crimes on board vessels within territorial waters of the United States⁸¹ or foreign countries⁸² are not within the statutory grant of jurisdiction to courts of admiralty jurisdiction, but are within the cognizance of the state or foreign country where committed. Statutes have given consular courts jurisdiction over crimes committed by seamen upon United States vessels.⁸³ The jurisdiction extends where the vessel is in the port of the country where the court is located.⁸⁴

The national jurisdiction over public vessels is complete, and exists even when the vessel is within foreign territorial waters. This jurisdiction is exercised through the courts martial

⁷⁸U. S. vs. Bevens, 3 Wheat. 366; U. S. Wiltberger, 5 Wheat. 76, (1820); U. S. vs. Holmes, 5 Wheat. 412, (1820).

⁷⁹Act. Apr. 30, 1790, 1 stat. 113; Rev. stat. 5346, 5576, Penal Code, 1911, sec. 272. The jurisdiction extends also to offenses committed on Guano Islands. Trial is held in the district court of the district where the offender is found or into which he is first brought, (Rev. stat. 730).

⁸⁰The Genessee Chief, 12 How. 443; The Hine vs. Trevor, 4 Wheat. 555, (1866); The Moses Taylor, 4 Wall. 44, (1866); Packer vs. Bird, 137 U. S. 661, (1891).

⁸¹U. S. vs. Bevens, 3 Wheat. 336.

⁸²U. S. vs. Wiltberger, 5 Wheat. 74, (1820), U. S. vs. McGill, 4 Dall. 426, (1806). U. S. vs. Rodgers, 150 U. S. 249, (1893), seems to be contra. In Reg. vs. Anderson, 11 Cox C. C. 198, (1868), a British case, the court took jurisdiction of a crime by a United States citizen on a British vessel forty-five miles up the Garonne of France. Moore's Digest, 2;937. See *infra* p. 42.

⁸³Rev. Stat. 4084, 4088.

⁸⁴In re Ross, 140 U. S. 453, (1891).

and executive authority. In the case of public vessels not of the navy, the laws giving courts of admiralty jurisdiction of crimes appear to apply as in the case of merchant vessels.

(3) The United States has in general recognized its duty to abstain from the assumption of jurisdiction over acts committed in foreign countries, but certain exceptions to this general rule have been recognized by law. For convenience we may consider the subject under the four heads, (a) acts committed by agencies of government, (b) by citizens, (c) by foreigners, and (d) laws of extraterritorial effect.

(a) The general exemption of foreign public vessels, armed forces, and diplomatic representatives from local jurisdiction is recognized by international law. The law of the United States provides for the exercise of jurisdiction over acts by its agencies of this character even in foreign countries. Naval forces of the United States in foreign jurisdiction continue subject to the articles for the government of the navy, navy regulations and naval instructions.⁸⁵ Crimes committed on board such vessels in foreign ports are subject to trial by court martial in the same manner as if the vessel were on the high seas or in a home port. Seamen of the navy are also subject to consular jurisdiction for acts committed abroad.⁸⁶

Armed forces may only enter foreign territory in time of peace by special license,⁸⁷ but wherever they are they remain subject to the articles of war, the army regulations, and the general orders of the war department.⁸⁸ As with naval forces, crimes committed by members of such forces in foreign territory are subject to court martial trial. Military law is personal, and non-territorial in effect.

The exemption from local jurisdiction of diplomatic representatives is recognized by international law and specified in the instructions to diplomatic officers issued by the president in 1897.⁸⁹ By these instructions diplomatic officers are forbidden

⁸⁵See Navy Regulations, 1913; Articles for the government of the Navy, Rev. Stat. 1624.

⁸⁶Consular Regulations, 1896, Sec. 630, p. 268. Moore's Digest, 2; 611. See Navy Regulation Nov. 2, 1875.

⁸⁷See Dig. op. Judge Ad. Gen. 1912, p. 90.

⁸⁸See Articles of War, Rev. Stat. 1342-1343; Dig. op. Judge Ad. Gen. 1912, pp. 511, 1071.

⁸⁹Instructions to Diplomatic Officers of the United States, (1897), Sec. 46, p. 18; Rev. Stat. 4063-4064.

to submit to local criminal or civil jurisdiction, or to testify in foreign courts without the express consent of the United States.⁹⁰ They remain subject to the instructions of the department of state and the president, by whom they may be recalled at pleasure,⁹¹ and to the law of the United States.

Consuls do not enjoy the exemptions of diplomatic officers from local jurisdiction except in non-Christian countries. They are, however, declared by the consular regulations of 1896 to be exempt from jury and militia duties, and their archives are not subject to local jurisdiction.⁹² Consuls abroad are subject to consular regulations and the authority of the department of state and the president. They may be punished in the United States for crimes committed abroad.⁹³ The consular regulations declare United States consular officers to be immune from local criminal and civil jurisdiction, and subject to diplomatic privileges in non-Christian countries.⁹⁴ In such cases their acts are subject to the jurisdiction of United States courts as in the case of ministers.

(b) Acts committed by United States citizens abroad are not in general subject to the jurisdiction of United States law. This applies to acts committed on national merchant vessels in foreign ports. Thus the United States courts have held that statutes conferring jurisdiction over crimes committed within the admiralty jurisdiction of the United States do not apply to crimes committed on vessels in foreign ports.⁹⁵ Crimes take place where they take effect; consequently the court refused jurisdiction in a case where an American citizen fired a shot from an American vessel, killing a man in foreign jurisdiction.⁹⁶

There are, however, exceptions to this rule. Statutes have provided for the punishment of crimes against the sovereignty of the United States, committed by citizens abroad, such as the unauthorized carrying on of diplomatic correspondence with foreign governments.⁹⁷ Another exception occurs in the case of countries where consular jurisdiction has been established

⁹⁰Diplomatic Instructions, 1897, Sec. 46, 48, 53, 56.

⁹¹Diplomatic Instructions, 1897, Sec. 272-280, Rev. Stat. 202.

⁹²Consular Regulations, 1896, Sec. 71-75.

⁹³Moore's Digest, 2:267.

⁹⁴Consular Regulations, 1896, Sec. 75.

⁹⁵U. S. vs. Wiltberger, 5 Wheat, 74, (1820); U. S. vs. McGill, 4 Dall. 426, (1806); contra, U. S. vs. Rodgers, 150 U. S. 249, (1893).

⁹⁶U. S. vs. Davis, 2 Sumner C. C. 482, (1837).

⁹⁷Act. 1799, Rev. Stat. 5335. See Moore's Digest, 2:264.

by treaty. Such treaties have been concluded with most non-Christian countries, although that with Japan was abrogated in 1894, as have been those of countries which have since become colonies of European states.⁹⁸ The treaties usually specify the limits of this jurisdiction, which has been further defined by act of congress.⁹⁹ According to this statute such consuls have jurisdiction over crimes committed by United States citizens in that country, or by sailors in United States vessels, even when the man is a foreigner.¹⁰⁰ A similar jurisdiction is given to consuls and commercial agents in places "not inhabited by any civilized people or recognized by any treaty with the United States."¹⁰¹ Besides this criminal jurisdiction consular courts exercise civil jurisdiction in cases where American citizens are defendants.¹⁰²

(c) The United States has of all countries been the most consistent in its opposition to the doctrine of extraterritorial jurisdiction over foreigners.¹⁰³ As has been observed, the jurisdiction over *citizens* for acts committed abroad, a jurisdiction which is permissible by international law and extensively exercised by many countries, has been but sparingly provided for in the law of the United States. In an exhaustive discussion of

⁹⁸Treaties now in force with Borneo, China, Korea, Morocco, Tripoli, Turkey, Persia, Siam, Tonga. Treaties have been concluded but since abrogated or superseded by annexation with Algiers, Muscat, Zanzibar, Japan, Madagascar, Samoa, Tunis.

⁹⁹Act Aug. 11, 1848, 9 Stat. 276, as amended in Rev. Stat. Sec. 4083-4130. Applies to China, Japan, Siam, Egypt, Madagascar, Turkey, Persia, Tripoli, Tunis, Morocco, Muscat, Samoa, and other countries with which appropriate treaties may be concluded. Rev. Stat. 4129. Japan, Madagascar, Tunis, Muscat, and Samoa have since been excluded by treaty.

¹⁰⁰Consular regulations, 1896, Sec. 629. In re Ross, 140 U. S. 453, (1891).

¹⁰¹Rev. Stat. Sec. 4088. This was held to permit the assumption of jurisdiction by a special agent sent over for that purpose in a country where no regular consul or commercial agent resided, by Att. Gen. Garland. (18 op. 219, 1885).

¹⁰²In exercising jurisdiction consular courts apply the law of the United States, the common law, the law of equity and admiralty, and "decrees and regulations" which ministers may make to "supply defects and deficiencies" in the other bodies of law mentioned. Rev. Stat. 4986; Cushing Att. Gen., 7 op. 503; Moore's Digest, 2:614-617.

¹⁰³See the *Appollon*, 9 Wheat. 362; U. S. vs. Davis, 2 Sumner C. C. 482, (1837).

extraterritorial crime,¹⁰⁴ written by John Bassett Moore in connection with the Cutting case, in which Mexico attempted to assert jurisdiction over an American citizen for acts committed against a Mexican citizen in the United States, only one instance is mentioned in which, aside from treaty agreements, jurisdiction is asserted over foreigners for acts in foreign territory. This case occurs in a statute of 1856¹⁰⁵ which authorizes consular officers and secretaries of legation to administer oaths and perform notarial acts, which shall be valid in the United States. The act also provides that persons committing perjury in such oaths shall be liable to criminal punishment as if the act were committed in the United States, and may be indicted in any district where arrested. This statute was justified by Attorney General Williams¹⁰⁶ on the ground that the domicile of the consul or diplomatic agent where the act was committed is to be regarded as a portion of United States territory. Moore thinks a more satisfactory justification can be found in the implied consent given by the foreign government, to submit its citizen to United States law, when he does these acts before an officer recognized by international law and by the foreign state's own law as competent to perform such functions.¹⁰⁷

To this example may be added that already mentioned of the jurisdiction exercised by consular courts over seamen of foreign nationality serving on American vessels in foreign ports. The consular regulations very specifically extend this jurisdiction, and in the case of *In re Ross*¹⁰⁸ its exercise was upheld by the United States supreme court in the case of a British subject, serving on an American vessel and found guilty of murder by the consular court for an act done on the vessel while in the harbor of Yokahama. The usual principle of jurisdiction over acts done on national vessels coupled with the extraterritorial jurisdiction over such vessels, granted to consuls by treaty in this case, furnishes sufficient justification for this exercise of jurisdiction over aliens for acts committed abroad.

¹⁰⁴J. B. Moore, Report on extraterritorial Crime, For. Rel., 1887, p. 770. A large portion of this report is printed in Moore's Digest, 2;243-269.

¹⁰⁵Act. Aug. 18, 1856; Rev. Stat. 1750.

¹⁰⁶Williams Att. Gen., 14 op. 285.

¹⁰⁷Moore's Digest, 2;267.

¹⁰⁸See Consular regulations, 1896, sec. 629; *In re Ross*, 140 U. S. 453, (1891).

Not so easily justified is the jurisdiction given by statute over *every person* committing assaults with a dangerous weapon on vessels wholly or partly owned by United States citizens, on the "high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state". Under this statute jurisdiction was upheld of a crime committed on an American vessel in the Detroit River within the territorial limits of Canada, thus limiting the term "particular state" to states of the union.¹⁰⁹

In general, however, the law of the United States gives adequate recognition to the duty of abstaining from the exercise of jurisdiction over extraterritorial crime by aliens.

(d) United States courts have in general refused to give an extraterritorial effect to laws, even when no limitation was expressed in terms. Thus the supreme court refused to apply the Sherman anti-trust law to prevent a monopoly in Costa Rica. Justice Holmes speaking for the court, said, "All legislation is *prima facie* territorial, words having universal scope, such as every contract in restraint of trade, * * will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator may subsequently be able to catch."¹¹⁰

In 1908 Judge Advocate General Davis expressed an opinion that declarations of war were laws of extraterritorial effect.¹¹¹ Consequently the president could call out the militia for service in foreign countries, under the constitutional and statutory authority to call them out "to execute the laws." A statute of 1908¹¹² based on this opinion recognized such extraterritorial laws, but the validity of this provision was denied in an opinion of the attorney general in 1912.¹¹³

¹⁰⁹Rev. Stat. 5346. See *U. S. vs. Rodgers*, 150 U. S. 249, (1893). In *U. S. vs. Wiltberger*, 5 Wheat 76, the court refused jurisdiction of a crime by an American citizen in an American vessel in the river Tigress of China. The statute under which indictment was made in this case was, however, sec. 12, of the crimes act of 1790, (see Rev. Stat. 5576) which extended jurisdiction only over the high seas. See also, *Thomas vs. Lane*, 2 Sumn. 1, U. S. vs. Coombs, 12 Pet. 72; *Moore's Digest*, 1:937-938.

¹¹⁰*American Banana Co. vs. United Fruit Co.*, 213 U. S. 347, (1909).

¹¹¹See Cong. Record, 60th Cong., 1st Sess., 1908, vol. 42, p. 6940, 6661; 63rd Cong., 2nd Sess., p. 7778.

¹¹²Act May 27, 1908, 35 Stat. 399, Sec. 5 p. 400.

¹¹³Att. Gen. Wickersham, 29 Op. 322, (1912). But see Act. Feb. 16, 1914, Sec. 4, in which the power to summon the naval militia for service "within or without" the territorial jurisdiction of the United States is given.

Though this view applies to ordinary laws, there are undoubtedly laws of extraterritorial effect. Such, for instance, are the articles of war, the articles for the government of the navy, and official instructions to army, navy, consular and diplomatic officers. These are laws of non-territorial character, applying to particular persons wherever they may happen to be. Such laws, however, have been applied only to citizens of the United States, with the minor exceptions mentioned in the last section, and consequently are not inconsistent with the obligation to abstain from extending laws, or assuming jurisdiction over aliens abroad.

(4) The courts have affirmed on numerous occasions that they can not assume jurisdiction over suits against foreign states, or sovereigns, or their official representatives, such as ministers and ambassadors.¹¹⁴ The commonwealths of the union have also been considered sovereign in this respect, and no suits against them entertained unless jurisdiction has been specifically granted by the constitution.¹¹⁵ The government of the United States is itself in this class and can not be sued unless specific provision is found in statute.¹¹⁶

The courts have, however, held that a nominal suit to discover facts may be within their jurisdiction.¹¹⁷ They may also assume jurisdiction of suits brought by sovereigns. As in such suits the sovereign has voluntarily submitted to their jurisdiction, setoffs may be allowed against him to the amount of his claim, but no more.¹¹⁸ The whole proceeding can never result in an actual judgment against a sovereign.

¹¹⁴*Underhill vs. Hernandez*, 168 U. S. 250; *Hassard vs. United States of Mexico*, 173 N. Y. 645, 61 N. Y. S. 939; *Res Publica vs. De Longchamps*, 1 Dall. 111, 116, (Pa.); *Hatch vs. Baez*, 7 Hun. 596, (N. Y. 1876); *Schooner Exchange vs. McFaddon*, 7 Cranch 137.

¹¹⁵*People vs. Dennison*, 84 N. Y. 272; *Beers vs. Arkansas*, 201 How. 527. The immunity of states from jurisdiction in federal courts in cases covered by the constitution was denied in *Chisholm vs. Ga.*, 2 Dall. 419, (1793), as a result of which the immunity was specifically granted from suits by subjects of another state or a foreign state, in the eleventh amendment.

¹¹⁶*Stanley vs. Schwalby*, 162 U. S. 255; *Kawananako vs. Polyblank*, 205 U. S. 349, 353.

¹¹⁷*Manning vs. Nicaragua*, 14 How. Prac. 517, (N. Y. 1857).

¹¹⁸*People vs. Dennison*, 84 N. Y. 272; *King of Spain vs. Oliver*, Fed. Cas. 7813; *U. S. vs. Eckford*, 6 Wall. 490; *The Siren* 7 Wall. 152. See also *Von Hellfeld vs. Russian Govt.*, a German Case, *Am. J. Int. Law*, 1911, 5; 490.

In a number of these cases the courts have specifically invoked the principle that courts apply international law, and have found the non-liability of sovereigns to suit among its rules.¹¹⁹ In other cases, the fact that jurisdiction implies power to enforce, a condition impossible as against sovereigns, was considered sufficient to warrant a refusal of judgment.¹²⁰ In cases where the plaintiff sought relief for infractions of right by his own sovereign, the principle that the power which may alter the law can never be bound by it was held to render such a jurisdiction out of the question. Thus in *Kawananako vs. Polyblank*,¹²¹ Justice Holmes, speaking for the court, said, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

The duties of abstention are in the main of a political nature, and beyond the power of municipal law to control. There have, however, been treaties and statutes defining methods of acquiring territory, the limits of the use of force against foreign countries, and the extent of the national jurisdiction. The courts also, although generally holding such questions political, and following the political department of government in any determination it may give regarding the international duties of abstention, have laid down rules, especially on the question of jurisdiction. As in laying down these principles upon which they and other public officers will act, they find the rules in the law of nations, and apply them according to the principle that courts of the United States apply international law in appropriate cases, judgemade law furnishes an effective municipal sanction to the fulfillment of the state's duties of abstention.

¹¹⁹*Hatch vs. Baez*, 7 Hun. 596, (N. Y. 1876); *Res Publica vs. De Longchamps*, 1 Dall. 111, 116.

¹²⁰*American Banana Co. vs. United Fruit Co.*, 213 U. S. 347, (1909).

¹²¹*Kawananako vs. Polyblank*, 205 U. S. 349, 353.

CHAPTER III. OBLIGATIONS OF ACQUIESCENCE

INTRODUCTORY

As a state is in general bound to abstain from the exercise of sovereignty *outside* of its territory, so in general it may resent any obstructions to the free exercise of its sovereign rights *within* its territory. As has been noted there are exceptions to the general rule of abstention from the exercise of extraterritorial sovereignty. In like manner there are exceptions to the rule of complete internal authority. International law specifies cases in which sovereign rights may not be exercised even within the territory, and thereby imposes a duty to acquiesce in these exemptions. There is, however, great difference of opinion as to what these exemptions are.

It seems that in common law countries the principle of absolute territorial sovereignty is adhered to in theory with great emphasis, but in practice numerous concessions are made.¹ In Roman law countries, on the other hand, many limitations of strict territorial sovereignty are recognized as law, but in practice few more concessions are allowed than under the common law. It is possible that the difference in theory can be traced to the territorial isolation of England in the days when common law originated, as distinguished from the situation of continental European states, where the effect of contiguity and a common descent from the Roman Empire was enhanced by the medieval conception, still lingering in the Roman Law, of a world state, to which all territorial states are subject. However, for our purposes the origin of the difference in theory is unimportant. We do not care whether the exemptions from territorial sovereignty actually practiced were originally justified by a theory of comity or of legal obligation. It remains that many of them are now so habitually observed in practice as to be distinctly obligations of international law. Others are observed with varying frequency, so should be classed as obligations of comity and good will rather than law. A third class of such concessions consists

¹See Chief Justice Marshall in *The Schooner Exchange vs. McFaddon*, 7 Cranch 116 (1812).

of obligations sometimes enunciated by theorists but seldom made effective or maintained by practical diplomatists.

In the first class are the complete or partial exemptions from territorial jurisdiction of certain foreign agencies of government, such as executive heads, diplomatic officers, armed forces, public vessels, consuls and sometimes of other foreign subjects, to which may be added the exemptions from complete control of certain portions of territory, such as international rivers and canals, ports and territorial waters of the ocean, and recently acquired territory.

In the second class are exceptions from the usual rule that courts apply the law of the land. Such exemptions occur in cases involving foreign persons, foreign judgments, foreign contracts, etc. Here exists the most marked difference between the Anglo-American and Continental theories. Writers of the latter school usually consider it a duty of the state to assume jurisdiction of cases and apply foreign law according to rules of private international law.² Common law writers, on the other hand, generally consider the matter entirely one of comity and policy.³ They deny that a state is under an international duty to apply foreign law according to any rules other than those its own jurisprudence may direct. Consequently they sometimes object to the term "private international law" but consider the rules governing "conflict of laws" as a branch of the common law. Which theory is best adapted to promote the welfare of men and nations we shall not attempt to decide, but it is certain that no sys-

²See H. Bonfils, *Manuel de Droit International Public*, 3rd ed., Paris, 1901, p. 3; F. DeMartens, *Traité de Droit International*, 3 vols., Paris, 1883, 2; 391-400: See also *Annuaire de l'institut de Droit International*, 1902, 1904, 1906, 1908 and compare attitude of representatives of Continental and Common Law countries in discussions of private international law.

³See T. E. Holland, *Elements of Jurisprudence*, 11th ed., N. Y., 1910, pp. 410-419; J. Westlake, *A Treatise on Private International Law*, 3rd ed., London, 1890, pp. 1-7; Joseph Story, *Commentaries on The Conflict of Laws*, 8th ed., Boston, 1883, pp. 8-9, 24; F. Wharton, *A Treatise on the Conflict of Laws*, 3rd ed., 2 vols., N. Y., 1905, pp. 2-4; A. V. Dicey, *A Digest of the Law of England with reference to the Conflict of Law*, 2nd ed., London, 1908, pp. 3-16; F. Pollock, *First Book of Jurisprudence*, 2nd ed., London, 1904, p. 99; T. J. Lawrence, *Principles of International Law*, 4th ed., N. Y., 1910, pp. 5-6; A. S. Hershey, *The Essentials of International Public Law*, N. Y., 1912, pp. 4-5. Bibliography, p. 13.

tem for the application of law has been universally consented to at present. Although American courts have occasionally applied rules on the subject because they deemed them established by international law,⁴ their general tendency has been to regard precedents of the common law alone. We will therefore exclude the rules of private international law from consideration. At present international law imposes no duty upon states to apply foreign law in certain cases.

In the third class are duties connected with the control of private persons and commerce. It is sometimes asserted that states are bound to acquiesce in the immigration of foreigners and the emigration of inhabitants; the naturalization of aliens and the expatriation of citizens; and the importation and exportation of goods.⁵ If the state were really under an international obligation to acquiesce in these matters, if it had no legal right to say who should enter or leave its territory, who should form its citizenship and what commercial policy should be pursued, the regime of territorial state sovereignty would be at an end. The United States has certainly not acted upon this theory in its entirety. It has passed laws prohibiting immigration not only of various classes but of whole races, and laws expelling aliens after they have arrived. In its diplomatic correspondence, instead of maintaining acquiescence in emigration as a duty under international law, it has considered it a duty of states to prohibit the emigration of certain classes.⁶ Even less has unlimited admission to citizenship been permitted by law. Large classes and whole races are permanently excluded from this privilege. Laws permitting naturalization have been framed with reference to national policy, not international duty. By admitting the right to restrict emigration, the right to prevent the loss of its citizens by

⁴See *Hilton vs. Guyot*, 159 U. S. 113 (1894), in which Justice Gray, speaking for the court, decided that international law, public and private, is part of the law of the United States and requires adherence to the principle of reciprocity in applying foreign judgments. He therefore refused to apply a French judgment, as French courts did not apply foreign judgments, but in *Ritchie vs. McMullen*, 159 U. S. 235, at the same time, he applied an English judgment on the same principle. Justices Fuller, Harlan, Brewer, and Jackson dissented in *Hilton vs. Guyot* on the ground that the common law was decisive, and it applied the principle of *res judicata* to foreign as well as domestic judgments.

⁵See Bonfils, *op. cit.*, sec. 412-414; Hershey, *op. cit.* p. 257, and note, also bibliography, p. 273.

⁶See Moore's Digest, 2;427.

expatriation is admitted. Whether the citizens who have emigrated and reside abroad may expatriate themselves, acquire citizenship in another country and claim the privileges of the new citizenship on returning is a different question. The United States has maintained that the recognition of the right of expatriation is a duty of international law, but all nations have not given assent to this doctrine.⁷ The opinion which considers a state bound to acquiesce in the freedom of commerce has certainly received no countenance from American practice. The United States has completely prohibited exportation, by embargo acts. It has prohibited trade with specified countries by non-intercourse acts and has habitually placed serious limitations upon importation by protective tariffs. No duty of acquiescence in these fields is required by international law, and the subject need no longer detain us.

Limiting consideration to the first class, we may discuss the national measures enforcing the duty to acquiesce in limitations upon the complete exercise of authority within the territory, under three heads: (1) privileges of foreign agencies of government and persons, (2) liabilities attached to newly acquired territory, (3) exemptions of certain portions of territory from complete control, or servitudes.

As in the case of the duty of abstention this duty is one directed immediately to the sovereign power of the state. If the sovereign refuses to acquiesce in the immunity of ambassadors, and orders his courts to assume jurisdiction over them, the courts must obey. If by an act of state he refuses to recognize the right of inhabitants of acquired territory to their vested rights under the former sovereign, the courts must obey.⁸ Or if he refuses to permit vessels in distress to enter his ports, and commerce to pass upon his boundary rivers, his international canals and his territorial waters, the obligation can not be enforced by municipal law.⁹ In all of these cases, however, in the absence of express

⁷The "inherent right of expatriation" was enunciated by congress in 1864, Rev. Stat., 1999-2000.

⁸See *West Rand Central Gold Mining Co., vs. Rex.*, L. R., 2 K. B. 391 (1905), which held that "an act of state" barred recovery from the British government of a claim due from the Transvaal government before acquisition. Discussion of this case by J. Westlake, "Is Int. Law Part of the Law of England?", *Law Quar. Rev.*, 22;14.

⁹The fortifications of the Panama Canal amounts to an announcement that the United States will not acquiesce in its freedom to commerce under all circumstances.

statute the courts may enforce the duty by adhering to the rule that international law is to be applied in appropriate cases, and that statutes are to be interpreted so far as possible in accord with that law. And where the rules of international law are expressly declared by treaty, statute or executive order, the power of municipal law to enforce is clear.

PRIVILEGES OF FOREIGN AGENCIES OF GOVERNMENT AND PERSONS

(1) Foreign public vessels are granted the right of asylum coupled with immunity from local jurisdiction in several treaties,¹⁰ and in a large number of treaties the United States has agreed to accord the most favored nation treatment to the diplomatic representatives of the contracting power,¹¹ and special privileges have frequently been thus accorded to foreign consuls. These privileges do not in general extend beyond the immunity of the consular archives from seizure, the inviolability of the consulate, and the privilege of adjusting disputes between sailors on national vessels and performing functions connected with commerce. Most treaties specify that the consul shall be subject to local jurisdiction in the same manner as citizens and to most favored nation treatment.¹² By a few treaties consuls are exempt from giving testimony,¹³ and in non-Christian countries, where extraterritorial privileges are granted consuls usually enjoy diplomatic immunities by treaty; such privileges, however, are not reciprocal.¹⁴

The consular regulations and diplomatic instructions outline

¹⁰See Treaties, France, 1778-1798, art. 17, Malloy p. 474; 1800-1809, art. 24, p. 504; Great Britain, 1794-1807, art. 25, p. 604; Prussia, 1785-1796, art. 19, p. 1483; 1799-1810, revived 1828, art. 19, p. 1493; Sweden, 1783-1799, revived 1816, 1827, art. 19, p. 1732; Netherlands, 1782-1795, art. 5, p. 1245.

¹¹Such treaties have been concluded with twenty-one countries, mostly in South and Central America. The Spanish treaty of 1902, also, contained this stipulation (art. 12, Malloy, p. 1704).

¹²In 104 treaties with 51 countries provision for consular officers is made. 20 special consular conventions with 15 countries have been concluded. Consular conventions with practically all countries are now in force. Russia, however, since the termination of the treaty of 1832, by joint resolution of congress in 1911, is an exception to this rule.

¹³For example see treaty with France, 1853, art. 2, Malloy, p. 529.

¹⁴See Moore's Digest, 5, 37-40. *Supra*, pp. 39-40.

the privileges of such officers. These executive orders are not of importance in enforcing the country's duty of acquiescing in the immunities of foreign resident officers, but they illustrate the view of the law taken by the United States.

In several treaties private citizens of the contracting parties are granted immunity from military service.¹⁵

(2) Courts have enforced the duty to acquiesce in the immunities granted by treaty and statute as well as others recognized by international law. They have held that jurisdiction may not be assumed of suits against foreign sovereigns,¹⁷ and former officers of foreign governments,¹⁸ for political acts, even when they are within the territory. The same exemption has been held to apply to public vessels¹⁹ and other personal property of a foreign state or sovereign.²⁰ Public armed troops and soldiers have also generally been held exempt when acting under orders of their sovereign,²¹ but in the celebrated case of *People vs. McLeod*,²² in which a court of the state of New York refused to recognize such immunities, a reverse attitude was taken. In this case the authorities at Washington favored the release of McLeod in accordance with international duty, but were unable to release him from state authority. The case illustrates the obstacle which the divi-

¹⁵Consular Regulations, 1896, sec. 71-75, 82. Diplomatic instructions, 1897, sec. 18, 46-49.

¹⁶Such treaties have been concluded with sixteen countries. Those with Argentina, 1853, art. 10, Malloy, p. 23; Congo, 1891, art. 3, p. 329; Costa Rica, 1851, art. 9, p. 344; Honduras, 1864, art. 9, p. 955; Italy, 1871, art. 3, p. 970; Japan, 1894, art. 1, p. 1029; Paraguay, 1859, art. 11, p. 1367; Servia, 1881, art. 4, p. 1615; Spain, 1902, art. 5, p. 1703, are now in force.

¹⁷See *Dicta* by Chief Justice Marshall, in *Schooner Exchange vs. McFaddon*, 7 Cranch 116 (1812). British case, *Mighell vs. Sultan of Johore*, L. R., 1894, Q. B. D., 1; 149.

¹⁸*Underhill vs. Hernandez*, 168 U. S. 250.

¹⁹U. S. *Peters*, 3 Dall. 121; *Schooner Exchange vs. McFaddon*, 7 Cranch 116, 137 (1812); *Tucker vs. Alexandroff*, 183 U. S. 424 (1902). See British case, *The Parlement Belge*, L. R., 5 P. D. 197, 217 (1900), *Bentwich*, p. 123; *Scott*, 220.

²⁰*Hassard vs. U. S. of Mexico*, 61 N. Y. S. 939 (1899). British case, *Vavasseur vs. Krupp*, L. R. 9, Ch. D. 351 (1878); *Moore's Digest*, 2, 558-593.

²¹*Tucker vs. Alexandroff*, 183 U. S. 424 (1902); *Dicta Schooner Exchange vs. McFaddon*, 7 Cranch 116 (1812).

²²*People vs. McLeod*, 25 Wend, 253; 26 Wend, 663; See *Moore's Digest*, 2; 24-25. McLeod was tried and finally acquitted on an alibi.

sion of power between state and national government may offer to the performance of international duties. Soon after this case, by an act of 1842,²³ congress provided for the release of such persons from state courts by habeas corpus issued by federal courts.

The exceptions to the general rule of exemption in cases where it becomes necessary for the state to vindicate a violation of its neutrality are considered under that subject.²⁴

(3) By statute courts are forbidden to take jurisdiction of cases against diplomatic ministers and members of their households upon either civil or criminal charges.²⁵ This has been held to apply to such officers accredited to third countries in transit through the United States²⁶ as well as those accredited to the United States, but the person claiming immunity must be an actual diplomatic officer. A consul general performing diplomatic functions was held not to be within the immunity.²⁷ Few cases have come before United States courts involving, directly, jurisdiction over diplomatic officers. Generally a release has been effected by executive authority before the process has gone so far. In a number of cases dealing with the punishment of persons violating diplomatic immunities the question has been discussed.²⁸ The courts have also held that a diplomatic officer may not be compelled to give testimony.²⁹

For the better enforcement of these duties the constitution has conferred jurisdiction over cases involving ambassadors and public ministers upon the federal courts, and has also given the supreme court original jurisdiction in such cases.³⁰ Statutes³¹

²³Act Aug. 29, 1842, Rev. Stat. sec. 753; Moore's Digest, 2; 30.

²⁴Infra, p. 129 et seq.

²⁵Act. Apr. 30, 1790, 1 Stat. 117, Rev. Stat., sec. 4063-4064.

²⁶Wilson vs. Blanco, 56 N. Y. Superior Court 582; 4 N. Y. S. 714; Scott, 206.

²⁷In re Baiz, 135 U. S. 403 See British case, Heathfield vs. Chilton, 4 Burr. 2015, Scott, 189. On diplomatic immunities generally see Ex Parte Cabrera, 1 Wash. C. C. 232; Cushing Att. Gen., 7 op. 367 (1855); Triquet vs. Bath, 3 Burr. 1478, and other English cases, cited Scott, 191, note.

²⁸U. S. vs. Liddle, 2 Wash. C. C. 205 (1808); Res Publica vs. De Longchamps, 1 Dall. 111 (Pa. 1784); U. S. vs. Ortega, 4 Wash. C. C. 531 (1825); U. S. vs. Benner, Baldwin 234.

²⁹Guiteau's Trial, 1; 136; Moore's Digest, 4; 645.

³⁰Constitution, Art. iii.

³¹Judiciary Act, Sept. 24, 1789, sec. 9, 11, 13, 1 Stat. 76, Rev. Stat. Sec. 687, 711, Judicial Code 1911, 36 Stat. 1087, sec. 256, cl. 8.

have made jurisdiction over such officers or their households exclusive in the federal courts, thus prohibiting the exercise of any such authority by state courts, and preventing an occurrence in reference to public ministers similar to that of the McLeod case, in reference to foreign armed forces. Statutes have also provided that the supreme court "shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or servants as a court of law can have consistently with the law of the nations."³²

The courts have held that consuls are not entitled to the immunity of ambassadors, but are subject to criminal and civil jurisdiction.³³ Consuls are generally held exempt from military and jury service, but United States citizens holding foreign consular positions may not claim this exemption,³⁴ and trading consuls are subject to the liabilities of native merchants in all that concerns their business.³⁵ Treaty privileges of consuls are protected by the constitutional principle that treaties are law to be applied by the courts. In a case in which a consul claimed immunity from subpoena under treaty, the court held that even the constitutional provision giving a person under criminal indictment the right "to have compulsory process for obtaining witnesses in his favor" would not permit of serving process on such a consul.³⁶

The constitution confers jurisdiction, in cases affecting consuls, upon federal courts and original jurisdiction in such cases upon the supreme court. By the Judiciary Act of 1789,³⁷ juris-

³²Rev. Stat. 687; Judicial Code, 1911, 36 Stat. 1087. sec. 233.

³³Commonwealth vs. Kosloff, 5 Serg. and Rawle, 545. (Pa. 1816); Coppel vs. Hall, 7 Wall. 542, (1868); Gittings vs. Crawford, Taney's Decisions, 1; In Re Baiz, 135 U. S. 403; Berrien, Att. Gen. 2 op. 378, (1830); Butler Att. Gen., 2 op. 725, (1835); Cushing Att. Gen. 6 op. 18, 367, (1854-1855). In U. S. vs. Ravara, 2 Dall. 297, (1793), a consul was subjected to criminal jurisdiction. British cases, see Barbuit's case, Cas. Temp. Talbot, 231 (1737); Clark vs. Cretico, 1 Taunt. 106, (1808); Viveash vs. Beckers 3 M. & S. 284, (1814).

³⁴Cushing Att. Gen., 8 op. 169, (1856).

³⁵Coppel vs. Hall, 7 Wall 542, (1868).

³⁶In Re Dillon, Fed. Cas. 710; Moore's Digest 5;78. The court held that the constitutional provisions only insure equal privileges in obtaining witnesses to the accused and the government, not an absolute right in either case. The French government maintained that rights of its consul under international law as well as under treaty had been violated by the serving of process which gave rise to this case.

³⁷Judiciary Act. 1789, Rev. Stat. sec. 711, Cl. 8.

diction of suits against consuls was given exclusively to federal courts. By an act of 1875 this provision was repealed, giving state courts a concurrent jurisdiction, but in the Judicial code of 1911 the jurisdiction of federal courts was again made exclusive. The supreme court exercises original, but not exclusive, jurisdiction in such cases.³⁸

(4) A more extensive limitation upon territorial sovereignty than the mere immunity of consuls in these respects, is the jurisdictional privileges accorded by some treaties. The United States has never concluded treaties by which foreign consuls or diplomatic officers exercise extraterritorial jurisdiction in its territory to the extent that such jurisdiction is commonly exercised in non-Christian countries, but certain privileges have been accorded. These privileges, which have always been reciprocal, generally permit foreign consuls to "sit as judges or arbitrators in such differences as may arise between the captain and crew of the vessels belonging to the nations whose interests are intrusted to their charge, without the interference of the local authorities," and to require the assistance of local authorities "to cause their decision to be carried into effect or supported."³⁹ These treaties undoubtedly impose a duty upon the United States to acquiesce in the consular jurisdiction provided for. It has been held that the authority is ministerial and not judicial,⁴⁰ and in an early opinion the court expressed the view that the treaties were not self-executing, and local officers could not lend assistance without statutory authority.⁴¹ This view is not generally maintained, but to avoid difficulties a statute of 1864⁴² required United States courts

³⁸Act, 1875, 18 Stat. 318. See *Wilcox vs. Luco*, 18 Cal. 639, (1898). The court below held that the constitutional provision alone gave exclusive jurisdiction to federal courts, but this was reversed in the state supreme court. See *Moore's Digest*, 5;72-77, *Scott*, 205-206, note. *Judicial code* 1911, 36 Stat. 1087, sec. 256, Cl 8; sec. 233.

³⁹See *Treaties with Prussia*, 1828, art. 10, *Malloy*, p. 1499; *France*, 1853, art. 8, p. 531; *Italy*, 1878-1881, art. 11, p. 980; 1881, art. 1, p. 983; *Sweden and Norway*, 1827, art. 13, p. 1753; *Austria-Hungary*, 1870, art. 11, p. 42; *Belgium*, 1880, art. 11, p. 97; *Germany*, 1871, art. 13, p. 554. See also *Consular Regulations*, 1896, and *Moore's Digest*, 2;298. The treaty with *France* 1788-1798, art. 12, *Malloy*, p. 495 gave consular courts jurisdiction "of all differences and suits between subjects" of the respective countries. See *Moore's Digest* 2;83-85.

⁴⁰*Cushing Att. Gen.*, 8 op. 380, (1857).

⁴¹See *Moore's Digest*, 2;298.

⁴²Act June 11, 1864, 13 Stat. 12, *Judicial code*, 1911, 36 Stat. 1087, sec.

and officers to issue process on application of consuls in fulfillment of treaty obligations when that country accorded reciprocal privileges as attested by proclamation of the president. The president has proclaimed this situation with reference to most of the treaties in force.⁴³ The courts have enforced these provisions by refusing jurisdiction of cases coming within the consular privileges,⁴⁴ but it has been held that where disturbances affect the tranquillity of the port, the national courts may always exercise jurisdiction.⁴⁵

(5) An exemption from territorial jurisdiction which if carried to excess might become a source of public danger is that granted to persons within diplomatic residences, consulates or public vessels. This is known as the right of asylum.⁴⁶ It should be noted that the immunity of public vessels and diplomatic and consular residences does not necessarily imply a right of giving asylum. Thus a great many treaties declare that consular residences shall be inviolable, but "in no case shall their offices and dwellings be used as places of asylum."⁴⁷ Although this distinction may exist in reference to the duty of the foreign privileged authority, it can not with reference to the duty of the state upon whose territory this authority is located. If the state must acquiesce in the immunity from entry of a diplomatic residence or a public vessel, it must also acquiesce in its use as an asylum, so far as immediate assertion of its authority is concerned. It can of course protest and recover the fugitive by diplomatic means.

⁴³Proclamations Feb. 10, 1870, May 11, 1872; See Moore's Digest, 2:299.

⁴⁴Tellefsen vs. Fee, 46 N. E. 562, (Mass.); The Elwine Kreplin, 9 Blatch. 438; Williams vs. Wellhaven, 55 Fed. Rep. 80.

⁴⁵This exception to the consular privilege is specified in all of the treaties mentioned, (note 39), except that with France 1853, art. 8, p. 531. See Wildenhuis' case, 120 U. S. 1; Com. vs. Luckness, 14 Phila. 363, (Pa.); Taft, Att. Gen., 15, op. 178, (1878).

⁴⁶On the right of asylum see Moore's Digest, 2:755. In early times the privilege of giving asylum was recognized and often abused. Moore says, "In some instances ambassadors of a thrifty turn realized enormous profits by hiring and granting their protection to houses which they then sublet to malefactors". Moore's Digest, 2:759.

⁴⁷See Treaties with Netherlands, 1878; Salvador, 1870; France, 1853; Belgium, 1868; 1880; Italy, 1868; 1878; Roumania, 1881; Servia, 1881; The German treaty of 1871, art. 5, Malloy p. 552, declares that consulates shall be inviolable "except in the case of pursuit of crime." See Moore's Digest, 2:755-757.

In its diplomatic instructions, consular regulations and naval instructions, the United States forbids the granting of asylum except in unusual cases.⁴⁸ This is the practice generally required by treaties and may be said to be the law, although in a number of cases American officials have given asylum, especially to political refugees in South American countries.⁴⁹

On the other hand the United States has generally recognized the immunity of diplomatic residences and foreign vessels of war from entry and service of legal process, although in an opinion of 1794⁵⁰ Attorney General Bradford held that a writ of habeas corpus could be served on a foreign public vessel, while in 1799⁵¹ Attorney General Lee thought civil or criminal process might be served in a British man of war. In an opinion of 1855⁵² Attorney General Cushing emphatically maintained the doctrine of exemption, going even to the extent of extraterritoriality. In several treaties the right of asylum to slaves on public vessels is affirmed,⁵³ and in the Brussels act of 1890⁵⁴ slaves fleeing to war vessels of the signatories are declared to become free. Consulates do not enjoy immunities, by international law, and consequently could under no circumstances give asylum, unless immunity is granted by treaty, as is done in a number of cases.

Acquiescence in the right of asylum, so far as it is necessitated by the immunity of diplomatic residences, consulates and public vessels from territorial jurisdiction, is enforced by the same means;⁵⁵ but there is really no duty of acquiescence, for the

⁴⁸See Diplomatic instructions, 1897, sec. 49-51; Consular Regulations, 1896, sec. 80; Navy Regulations, 1913, sec. 1649.

⁴⁹See Moore's Digest, 2;781-883.

⁵⁰Bradford Att. Gen., 1 op. 47, (1794).

⁵¹Lee Att. Gen., 1 op. 87, 89, (1799).

⁵²Cushing Att. Gen., 7 op. 112; 8 op. 73, (1855, 1856).

⁵³By the treaty with Algiers of 1795-1815, art. 11, Malloy p. 3, the return of slaves fleeing to public vessels was required; by that of 1816-1830, art. 14, p. 14, Christian captives fleeing to United States public vessels might be granted asylum. By the treaty with Tunis 1797-1824, art. 6, p. 1795, the return of slaves was demanded, but as amended in 1824-1904, art. 6, p. 1801, slaves gaining asylum were free. The treaty with Madagascar, 1881-1896, art. 7, p. 1071, forbade the giving of asylum to slaves.

⁵⁴General act for the Repression of the Slave Trade, Brussel's Convention, 1890, art. 28, Malloy, p. 1975.

⁵⁵See *U. S. vs. Jeffers*, 4 Cranch C. C. 704, Scott, 256, (1836), in which a constable was removed from office for arresting a fugitive slave in the house of a British Secretary of Legation. See British case, *Forbes vs. Cochrane*, 2 Barn. & Cress, 448, (K. B. 1824), Scott, 258, where it was

state may, within its international right, protest the matter diplomatically.

Resident subjects of foreign states are permitted no special privileges or exemptions from territorial jurisdiction except those specifically accorded by treaty, such as military exemptions. In these cases the courts by directly enforcing treaty provisions as law may enforce the states' duty of acquiescence.

LIABILITIES ATTACHED TO NEWLY ACQUIRED TERRITORY

The second duty of acquiescence relates to the rights of the inhabitants of newly acquired territory and the liabilities attached to the land. The rules governing these matters are ordinarily spoken of as the law of succession. According to the strict principle of territorial sovereignty, as soon as new territory is acquired, any relations between its inhabitants and the new government would become matters of municipal law. No obligations of international law could exist. The actual law, however, recognizes this case as an exception to the usual rule of complete territorial sovereignty. The land must be taken subject to a kind of servitude. The acquiring state must acquiesce in pre-existing rights of the inhabitants and pre-existing rights of third parties hypothecated upon the territory. These obligations may be classified under three heads: (1) treaties imposing obligations upon the former sovereign, (2) liabilities attached to the territory, (3) rights of the inhabitants derived from the former sovereign.

held that slaves reaching a British warship became free; hence Forbes, the owner of a plantation in Florida, had no action against Cockburn, commander of a public vessel, for affording asylum to and carrying off such fugitive slaves. For extended discussion of rights of asylum on public vessels and limits of local jurisdiction over such vessels in port according to English law, see Report of Royal Commission on Fugitive Slaves, 1876. Great Britain forbade public vessel to give asylum to slaves by an order of 1875. (*Br. and For. St. Papers*, 66:892). The Royal commission appointed to consider this order held as follows: For right of asylum and extraterritoriality, Phillimore, Bernard, Maine; Contra, Cockburn, Archbald, Thesiger, H. T. Holland, FitzJames Stephen, Rothery, but they held that asylum might be given as a matter of humanity and in any case the local authorities could not recover the fugitives by entry of the vessel. It is interesting to note that the line of cleavage is between publicists on international law and common law lawyers and judges. See in reference to the work of this commission, Maine, *Int. Law*, p. 88; Stephen, *Hist. of the Criminal Law*, 2:57; *Jour. of Jurisprudence*, 20, 1888; Moore, *Digest*, 2:848.

(1) International law requires the new sovereign to recognize the obligations of treaties concluded by the old sovereign only in case of universal succession. There have been two cases of this character in the history of the United States, those of Texas and Hawaii. Both states had concluded treaties with third parties before annexation.⁵⁶ In both cases, in the resolution of annexation the United States declared all treaties of the former states abrogated. Japan offered some protest to the abrogation of her treaty with Hawaii but the United States disavowed any intention of violating vested rights of Japanese subjects under this treaty, and no specific case seems to have arisen.⁵⁷

(2) The second case has arisen in connection with the annexation of Texas and Hawaii and the cessions of Spain following the war of 1898.⁵⁸ The United States assumed by statute liabilities hypothecated upon the revenues to a specified amount in the first two cases.⁵⁹ In the case of the Spanish cessions the

⁵⁶See Treaties of Texas with France, 1839, Marten's N. R., 16;987: with Great Britain, 1840, Marten's N. R. G., 4;1506: 1841, Ibid, 4;609: with Netherlands, 1840, Ibid, 1;375: See Moore's Digest, 1;456. Texas had also concluded treaties with the United States, see Malloy, pp. 1778-9, which were of course abrogated by annexation. See treaty of Hawaii with Japan, 1886, Br. and For. St. Pap., 77;941.

⁵⁷ Joint Resolution, Mch. 1, 1845, 5 Stat. 797; July 7, 1898, Sec. 4, Germany claimed that she retained special rights in the Zulu Archipeligo under protocol with Spain of Mch. 11, 1877, after cession of the Philippines to the United States, a contention denied by the United States. See Moore's Digest 5; 346-352.

⁵⁸The Act of Aug. 8, 1790, sponsored by Hamilton, whereby the national government, as succeeding to much of the sovereignty of the states by the constitution of 1789, assumed their Revolutionary debts to the amount of \$21,500,000, may also be cited as a recognition of the duty of the successor to sovereignty. I Stat. 142, Sec. 13.

⁵⁹By the joint resolution of Mch. 1, 1845, 5 stat. 797, consenting to the admission of Texas to the Union, it was specified that Texas should retain public funds, debts, taxes and dues owed the Republic, and vacant lands, to be applied to the payment of debts which were in "no event to become a charge upon the United States." By an act of Sept. 9, 1850, 9 Stat. 446, on consideration of a boundary modification and relinquishment by Texas of "all claims upon the United States for liability of the debts of Texas" the United States agreed to pay \$10,000,000 to the state, half of which was to be retained until "the creditors of the state holding bonds and other certificates of the state of Texas for which duties on imports were specially pledged shall first file at the Treasury of the United States,

United States refused to include in the treaty of peace a provision presented by the Spanish plenipotentiaries by which the United States was to assume "all charges and obligations of every kind in existence at the time of the ratification of the treaty of peace which the crown of Spain * * may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof."⁶⁰ It also rejected a provision requiring that "grants and contracts for public works and services" in Cuba, Porto Rico, and the Philippines be "maintained in force until their expiration, in accordance with the terms thereof, the new government assuming all the rights and obligations thereby attaching up to the present time to the Spanish government." It, however, disavowed, any purpose "to disregard the obligations of international law in respect to such contracts."⁶¹ A number of claims based on Spanish concessions were presented to the government and were variously settled in accordance with opinions of attorneys general and law officers of the War Department, which was then administering the Islands.⁶² As an example may be mentioned the case of the Manila Railway Co., a corporation subsidized by the Spanish government which

releases of all claims against the United States." As few of the Texan bonds were specifically pledged upon imports, the act gave rise to question, but was held to require payment of all bonds. (See Cushing Att. Gen. 6 op. 130, (1853), Corwin, Sec. of Treas., Sen. Ex. Doc., 103, (34th Cong. 1st Sess, p. 406-7). In the British claims arbitration of 1853, claims for Texan bonds were presented and the commission held that the United States was not liable, hence these claims were not within the competence of the arbitral court. The matter was concluded by an act of Feb. 28, 1855, 10 stat. 617, by which the United States agreed to pay Texan debts for which the revenues of the state were pledged to the amount of \$7,750,000, to be apportioned pro rata among the creditors. See Moore's Digest, 1;343-347. In the Joint Resolution of July 7, 1898, annexing Hawaii. "the public debt of the Republic of Hawaii" was assumed by the United States to an amount not to exceed \$4,000,000. See Moore's Digest, 1;351.

⁶⁰This applied to Cuba and Porto Rico. See Moore's Digest, 1;352. The United States delegation held that these obligations were incurred in a fruitless effort to pacify the Islands extending over a long period of years. The expenditure did not benefit the Islands and should be considered liabilities of the Spanish nation, not of the Islands. See Moore's Digest, 1;351-385.

⁶¹Moore's Digest, 1;389-390.

⁶²Griggs. Att. Gen., 22 op. 310, 408, 514, 520, 546; 23 op. 181; Knox, Att. Gen. 23 op. 451.

claimed a continuance of the periodic subsidies by the new government. The law officer of the Division of Insular affairs of the War Department⁶³ advised the non-allowance of the claim, holding it to be a personal obligation of the Spanish sovereign, but the attorney general⁶⁴ took a contrary view, and in an official opinion held that the United States was liable for this obligation under international law.

To summarize, the United States has generally acknowledged its obligation to pay debts pledged on the revenue, and contracts for the improvement of territory to which it has succeeded. It however, denied such an obligation with reference to the general public debt of the dismembered state, in cases of partial succession.

(3) Certain rights of the inhabitants have generally been specified in treaties ceding territory to the United States. Freedom to leave the country and retain their former allegiance without loss of property, and in case of election to remain in the territory, guarantees of civil rights, religious liberty and sometimes admission to American citizenship have generally been so stipulated.⁶⁵ Similar provisions have been contained in resolutions, statutes and executive orders relating to the annexation, government and administration of new territory.⁶⁶ By enforcing these provisions the courts have enforced the government's obligations under international law.

The enforcement of constitutional guarantees also acts to protect the rights of inhabitants of such territory, but the courts have drawn distinctions as to the applicability of these guarantees to different kinds of acquisitions. All of the constitutional

⁶³Magoon's Reports, 177.

⁶⁴Griggs Att. Gen., 23 op. 181; Knox Att. Gen., 23 op. 1,451. See Moore's Digest, 1,389-410.

⁶⁵Treaties with Great Britain, 1783, art. 4, 5, 6, Malloy, p. 586; 1840, art. 3, p. 656; France, 1803, art. 3, 6, p. 508; Mexico, 1848, art. 8, 9, 11, p. 1111; 1853, art. 2, 5, p. 1121; Russia, 1867, art. 3, p. 1523; Spain, 1819, art. 5, 6, 8, p. 1653; 1898, art. 9, 12, p. 1690.

⁶⁶See Northwest Ordinance, July 13, 1787; Act. Aug. 7, 1789; in reference to Louisiana, Act. Oct. 2, 1803, 2 Stat. 245; Mch. 19, 1804, 2 Stat. 272; in reference to Texas, Joint Resolution, Mch. 1, 1845, 5 Stat. 797; Act Sept. 9, 1850, 9 Stat. 446, Feb. 28, 1855, 10 Stat. 617; In reference to New Mexico, Act. Mch. 3, 1891, 26 Stat. 854; in reference to Hawaii, Joint Resolution, July 7, 1898, Act. Apr. 30, 1900; in reference to Porto Rico, Act Apr. 12, 1900, May 1, 1900; in reference to Philippines, Act July 1, 1902, Mch. 9, 1902; in reference to Guano Islands, Act 1856, Rev. Stat. 5570-5578.

guarantees apply to incorporated territory such as Alaska,⁶⁷ and territory contiguous to the original colonies, but those conferring privileges not "natural rights," but of a technical nature relating peculiarly to the common law, such as trial by jury, or of a political nature such as citizenship, do not apply to inhabitants of unincorporated territory, such as the Philippines, Hawaii, and Porto Rico.⁶⁸ None of the constitutional guarantees appear to apply to territory temporarily occupied and under military government,⁶⁹ or to consular jurisdiction.⁷⁰ It appears, however, that the confiscation of property or the deprivation of life or liberty of persons without "due process of law" in *actually acquired* territory, would be prevented by constitutional guarantees.

The United States courts have held that all public law relating to forms of government, revenue systems, and administration is abrogated by change of sovereignty,⁷¹ but in a number of cases the executive has by order continued the former administrative authorities, in which case their acts are valid.⁷² The

⁶⁷Rasmussen vs. U. S., 197 U. S. 510.

⁶⁸For this distinction and reference to "natural rights" see Justice Brown, in Downes vs. Bidwell, 182 U. S. 244, 282. For its application to Hawaii, Hawaii vs. Mankichi, 190 U. S. 197; to the Philippines, Dorr vs. U. S., 195 U. S. 138; and to Porto Rico, Gonzales vs. Williams, 192, U. S. 1.

⁶⁹Neeley vs. Henkel, 180 U. S. 109, 122.

⁷⁰In re Ross, 140 U. S. 453, 464.

⁷¹Harcourt vs. Gaillard, 12 Wheat. 523; New Orleans vs. U. S., 10 Pet. 602; Davis vs. Concordia, 9 How. 280; U. S. vs. Vaca, 18 How. 556; Am. Ins. Co., vs. Canter, 1 Pet. 542; Pollard vs. Hagan, 3 How. 212-225; U. S. vs. Reynes, 9 How. 127; U. S. vs. D'Auterine, 10 How. 609; Montoult vs. U. S., 12 How. 47; U. S. vs. Yorba, 1 Wall. 412; Stearnes vs. U. S., 6 Wall. 589; U. S. vs. Pico, 23 How. 321; Moore vs. Steinbach, 127 U. S. 70; Alexander vs. Roulet, 13 Wall. 386; Mumford vs. Wardwell, 6 Wall. 423. See Moore's Digest, 1;304-311. For effect of succession on Revenue Laws, see Flemming vs. Page, 9 How. 603; Wirt, Att. Gen., 1 op. 483, (1821); Cross vs. Harrison, 16 How. 164; President's Proclamation, July 25, 1901, and Insular Cases, DeLima vs. Bidwell, 182 U. S. 1; Downes vs. Bidwell, 182 U. S. 244; Dooley vs. U. S. 182 U. S. 222; Armstrong vs. U. S. 182 U. S. 243; Huus vs. N. Y. & Porto Rico, Steamship Co. 182 U. S. 392; Goetz vs. U. S. 182 U. S. 221; Crossman vs. U. S. 182 U. S. 221; Fourteen Diamond Rings, 103 U. S. 176; Dooley vs. U. S. 183 U. S. 151. See Moore's Digest, 1;311-332.

⁷²Joint Resolution, July 7, 1898, in reference to Hawaii; War Dept. Circular, Feb. 1899, in reference to territory under military government; act May 1, 1900, in reference to Porto Rico. See Ely's Adm. vs. U. S. 171 U. S. 220, 230, (1898). Moore's Digest, 1;306-308.

system of private law in force has, however, been held to continue until specifically altered by statute. It is upon this principle that the courts of all of the states, originally British colonies or settled from them, have continued to apply the common law,⁷³ while those of Louisiana and Texas have applied the French and Spanish systems of law respectively. The application of the English law of admiralty in federal courts has been based on a like principle.⁷⁴ The courts have applied the same principle to other acquisitions of territory such as Florida, New Mexico, and the Spanish cessions of 1898.⁷⁵

The inviolability of existing contracts and property rights of inhabitants of acquired territory has been generally upheld in reference to obligations owed by the former state itself to such inhabitants. Inhabitants as well as persons of foreign states benefit by the acquiescence of the new sovereign in its duty to assume the public burdens attached to the territory.⁷⁶ If a

⁷³In *Mortimer vs. N. Y. Elevated R. R. Co.*, 6 N. Y. S. 89, (1889), Scott, 111, a claim that Dutch law rather than English should apply in reference to the portion of New York City originally occupied by the Dutch was denied. The British claim based on Cabot's discovery prior to Dutch occupancy established, in the view of the court, the common law. The court admitted that modern publicists hold that discovery not followed by occupation is insufficient to give title to new territory, but thought that, by the international law of that time, Cabot's claim was valid. As an additional reason for its opinion the court seemed to cast some doubt on the principle that succession does not alter the private law. Thus it held that even if Cabot's claim were not sufficient to establish a prior British title, the Dutch law would have been abrogated by the British conquest and acquisition in 1664. The court, however, suggested that the charter of Charles II, of 1664, specifically established the common law. The intervention of such an act of state would clearly bind municipal courts, even if contrary to international law. It would seem that prescription might have furnished sufficient basis for maintaining the predominance of English law in this case, but it does not seem to have been relied upon.

⁷⁴*Thirty Hogshead of Sugar vs. Boyle*, 9 Cranch 191, (1815).

⁷⁵*Louisiana*, see *Keene vs. McDonough*, 8 Pet. 308; *U. S. vs. Turner*, 11 How. 663; *Florida*, see *Am. Ins. Co. vs. Canter*, 1 Pet. 542; *New Mexico*, *U. S. vs. Power's Heirs*, 11 How. 570, *U. S. vs. Heirs of Rillieux*, 14 How. 189; *Leitsendorfer vs. Webb*, 20 How. 176. In *Chicago Pac. R. R. Co. vs. McGlenn*, 114 U. S. 542, the state law was held to apply in territory donated by the state of Kansas to the Federal Government for a penitentiary. See *Mortimer vs. N. Y. Elevated R. R. Co.* 6 N. Y. S. 89, (1889), Scott, 111, note 73 above. See also *U. S. vs. Chaves*, 159 U. S. 452, (1895); *Strother vs. Lucas*, 12 Pet. 410.

⁷⁶*Supra*, p. 57.

definite act of the political department of government repudiates such liability, there is no recourse for the inhabitants,⁷⁷ although foreigners entitled to similar credits can still resort to diplomatic protest.

Where the obligation is one between private parties, treaties generally have required inviolability, and the courts have emphatically maintained that the same doctrine holds in the absence of treaty.⁷⁸ Thus Chief Justice Marshall, in upholding a real estate right in Florida based on a grant by Spain, said, "It is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume domain over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change allegiance, their relations to their ancient sovereign are dissolved, but their relations to each other and their right of property remain undisturbed."⁷⁹

⁷⁷*West Rand Central Gold Mining Co. vs. Rex*, L. R. 2 K. B. 301, 401-2, (1905), and article by J. Westlake, *Law Quar. Rev.*, 22;14-26. In this case it was held that an "act of state" barred the right of an inhabitant of the Boer Republic to recover debts owed him by that republic, from Great Britain, after succession.

⁷⁸*Wilcox. vs. Henry*, 1 Dall. 69, (Pa., 1782); *U. S. vs. Soulard*, 4 Pet. 511, (1830); *U. S. vs. Percheman*, 7 Pet. 51, (1833); *U. S. vs. Arredondo*, 6 Pet. 691; *U. S. vs. Clarke*, 8 Pet. 436; *U. S. vs. Clarke*, 16 Pet. 231; *U. S. vs. Repentigny*, 5 Wall. 212, (1866); *U. S. vs. Hansen*, 16 Pet. 196, *Delassus vs. U. S.* 6 Pet. 117, 133, (1835); *Mitchell vs. U. S.* 9 Pet. 711, (1835); *U. S. vs. Yorba*, 1 Wall. 412; *Townsend vs. Greeley*, 5 Wall. 326; *U. S. vs. Anguisola*, 1 Wall. 352; *Airhart vs. Massieu*, 98 U. S. 491; *Coffee vs. Grover*, 123 U. S. 1, 9, (1887); *Ely's Adm. vs. U. S.* 171 U. S. 220, 223, (1898); See *Moore's Digest* 1; 414-427. For citation of further cases see *Scott*, cases, 97 note. By statute of 1860 congress authorized the courts to settle land claims near the Sault Ste. Marie based on a grant of the King of France in 1750, according to international law, the law of the country from which the claim was derived, principles of justice and stipulations of treaties. Under this act the court held that a grant of land on certain conditions of occupancy was lost upon the grantee's failure to fulfill these conditions after leaving the country because of Great Britain's succession in 1760. The opinion of both the original grantee and his son that the claim was lost, and the failure to advance a claim until seventyfive years after the grant, confirmed the court's opinion that the claim was without merit. See *U. S. vs. Repentigny*, 3 Wall. 211, (1866), *Scott*. 98.

⁷⁹*U. S. vs. Percheman*, 7 Pet. 51, 86, (1833).

This same principle has been applied in cases of succession to insurrectionary and military governments. Private rights and obligations, valid under the law of the previous defacto government, have been enforced.⁸⁰ Neither public nor private obligations will, however, be held as valid if they were contracted in support of armed resistance to the United States, or in rebellion. Thus the courts have held that all acts of the Confederate government of 1861 to 1865 were void. No rights could be derived from its laws because its very existence was rebellion against the United States. Acts of the states in rebellion, however, might be valid if not in direct aid of the insurrection.⁸¹ Acts of the Confederate congress accepted by them and enforced by their law, such for instance as acts requiring the acceptance of Confederate paper currency, were valid. Thus the United States courts, after the war, enforced contracts for the payment of Confederate paper for an equivalent value at the time the contract was made, in United States money.⁸²

To summarize, the United States has generally by treaty obligated itself to permit the inhabitants of acquired territory to retain their old allegiance if they wish. Treaties, statutes and constitutional guarantees have insured them the usual immunities of citizens. Treaty guarantees and the doctrine that courts apply international law have insured the retention of the existing system of private law until changed by express act of the legislature, and the inviolability of private property rights unless they were directly involved in the promotion of hostilities or rebellion. Statutes and executive orders have occasionally retained portions of the previous system of public law and administration, but the courts have affirmed that public law is abrogated by succession unless express act of the sovereign intervenes.

⁸⁰Succession to British Military Govt. of Castine, Me., 1814, U. S. vs. Rice, 4 Wheat. 246, (1819); to confederate De Facto Govt. of Southern states, 1861-1865, Thorington vs. Smith, 8 Wall. 1, 9-11, (1868); The Venice, 2 Wall. 258; Hanauer vs. Woodruff, 15 Wall. 448; Bissell vs. Heyward, 96 U. S. 580; Delmar vs. Insurance Co., 14 Wall. 661; Horn vs. Lockhart, 17 Wall. 570, 580; Baldy vs. Hunter, 171 U. S. 388, 392, (1890); Sprott vs. U. S., 20 Wall. 459, (1874). See Moore's Digest, 1;45-80.

⁸¹On the distinction between acts of the Confederate government and of the state in rebellion, see Sprott vs. U. S. 20 Wall. 459, (1874); Williams vs. Bruffy, 96 U. S. 176, 191-2, (1877); Dewing vs. Perdicaries, 96 U. S. 193, (1877); Ford vs. Surget, 97 U. S. 594, 604, (1878). See Moore's Digest, 1;54-60.

⁸²Thorington vs. Smith, 8 Wall. 1, (1868).

SERVITUDES.

There have been at different times claims that certain portions of territory are subject to servitudes or rights of use by foreign powers and persons, which are beyond the authority of the territorial sovereign to abridge. Thus it has been said that international rivers and canals are owned by adjacent states subject to the rights of free commerce for all; that marginal seas and straits are free to the innocent passage of foreign vessels, that the territorial sovereign's control of ports is subject to the right of asylum for vessels in case of imminent danger from stress of weather or other cause; that certain portions of territory are subject to the right of innocent passage of foreign troops, and even that all foreign territory, especially frontiers, is held by the territorial sovereign subject to the right of foreign states to enter the same for the purpose of enforcing order when self defense demands.⁸³ The United States for a long time maintained that British territorial waters about Newfoundland were subject to prescriptive fishing rights of United States fishermen.

If there are any such inalienable servitudes they clearly put the territorial sovereign under a duty of acquiescence. By the award of the Hague arbitration of 1910 between Great Britain and the United States it was held that servitudes were contrary to the doctrine of sovereignty maintained by international law, and could be recognized "only on the express evidence of international contract;" hence the American claim that prescriptive fishing rights on Newfoundland territorial waters constituted a legal servitude in which Great Britain must acquiesce, was of no avail.⁸⁴

(1) It seems that possibly an exception to this broad statement should be made in the case of boundary rivers. In that case the right of free commerce could scarcely be unilaterally restricted, and is universally recognized. United States courts have recognized the principle by holding that vessels traversing American waters of international rivers cannot be seized for

⁸³Pleas of self defense were used to justify violations of Spanish and Mexican territory in pursuing Indian marauders, and the landing of troops in foreign ports to protect United States citizens as in the recent (1914) case of Vera Cruz. See Moore's Digest, 2:400-425. On servitudes generally see Hall, *Int. Law*, 4th ed., p. 106; Moore's Digest, 2:18.

⁸⁴See text of this decision, *Am. Jour. Int. Law*, 4:948, 958, (1910), Editorial Comment, *Ibid.* 8:859, (1914); also article C. P. Anderson, *The Final Outcome of the Fisheries Arbitration*, *Ibid.* 7:1, 9, (1913).

violation of municipal statutes when bound for a foreign port.⁸⁵

(2) The right of asylum for vessels in distress has also been affirmed in United States law.⁸⁶ The courts have refused to condemn vessels forced by stress of weather into ports closed by statute or blockaded by right of war.⁸⁷ The right of asylum, however, is subject to the provision that the vessel, unless a public one, shall be subject to the local jurisdiction. It can therefore scarcely be said that the privilege constitutes a servitude upon the port waters.

Most of these so-called servitudes are not maintainable by modern international law. The United States has diplomatically and judicially affirmed its absolute right to sovereignty over its entire territory.⁸⁸

(3) Servitudes conceded by treaty are, however, clearly recognized and certainly impose a duty of acquiescence upon the country. The United States has specifically accorded by treaty the right to certain countries of free commerce in international rivers⁸⁹ and in the Panama canal,⁹⁰ the right of asylum in ports to either private or public vessels in case of "stress of weather or pursuit of pirates or enemies,"⁹¹ the right of using troops

⁸⁵The Appollon, 9 Wheat. 362, (1824).

⁸⁶Cushing, Att. Gen. 7 op. 122, (1855); The Santissima Trinidad, 7 Wheat. 283; Moore's Digest, 7; 982-985. Great Britain treated Jefferson's proclamation, prohibiting hospitality to British warships in 1807, after the Leopard and Chesapeake affair, as a breach of international law. See Moore's Digest, 6; 1035.

⁸⁷The Nuestra Senora de Regla, 17 Wall. 30; Moore's Digest, 2; 339 et seq.

⁸⁸Schooner Exchange vs. McFaddon, 7 Cranch 116-136, (1812). See Moore's Digest, 2; 4-16.

⁸⁹Treaties with Great Britain, 1783, art. 8, Malloy, p. 589; 1842, art. 3, p. 643; 1846, art. 2, p. 657; 1854-1866, art. 4, p. 671; 1871, art. 26, p. 711, decreeing free navigation in the Mississippi, St. Lawrence, St. John, Yukon, Stikine, and Porcupine. With Mexico, 1848, art. 4, 7, p. 1111; 1853, art. 4, p. 1123, decreeing free navigation in the Colorado, Gila, and Bravo.

⁹⁰Treaty with Great Britain, 1901, art. 3, Malloy, p. 783.

⁹¹The United States has concluded thirty-one treaties with twenty-five countries in which this privilege is specified. Only two appear to be in force, Bolivia, 1858, art. 9, Malloy, p. 117; Prussia, 1799-1810, revived 1828, art. 18, p. 1492. The privilege of free entry to ports is now so universally acknowledged that treaty stipulations are not necessary.

on its territory in pursuit of marauding Indians⁹² and the right to establish submarine cable terminals.⁹³ The usual principle that treaties are enforceable law tends to enforce these duties, but acts of congress may always override such treaty privileges so far as municipal law and the controlling power of municipal courts are concerned.⁹⁴

⁹²Protocols with Mexico, 1882 to 1896, by which Mexico was permitted to pursue marauding Indians in United States territory. Malloy, p. 1144-1177.

⁹³Special permits with rules have generally been issued by the president to companies desiring to land cables. On the power of the president to give such permits see Richards, Acting Att. Gen., 22 op. 13, (1897) ; Griggs, Att. Gen., 22 op. 408, (1899). See Moore's Digest, 2;452-466.

⁹⁴For a recent discussion of treaty servitudes or international contracts, see *Aix-la-Chappelle Maestricht R. R. Co. vs. Thewis*, Dutch Govt. intervener, Apr. 21, 1914, a German case, reported *Am. Jour. Int. Law.*, 1914, 8;858, 907. In this case a portion of Prussian territory was held to be subject to a servitude by which a Dutch Railway Company had the right to operate under Dutch law. Germany claimed that a protocol of Mch. 11, 1877, with Spain created a servitude for her benefit upon the Zulu Archipelago, which remained after cession of the Archipelago to the United States. The United States refused to recognize this claim. See Moore's Digest, 5;351.

CHAPTER IV. OBLIGATIONS OF PREVENTION.

INTRODUCTORY

The municipal laws designed to insure the abstention of the government from illegal acts outside of its territory, and its acquiescence in recognized exemptions from its complete control of its own territory have been considered. But its duties under international law do not stop here. The government is responsible for the acts of its officers and its civil population. It is therefore under an obligation to take positive measures to prevent contraventions of international law by such persons.

The duties of prevention bear a relation to duties of abstention and acquiescence. The responsibility of the government for its subjects extends no further than its own duties. It need prevent nothing which it is not itself bound to abstain from authorizing. In fact it does not extend so far. There are many acts of its subjects which the government is not responsible for and which it need not prevent, but which it must itself abstain from. This is especially evident in the law of neutrality. A neutral government need not prevent the export of arms by its subjects to belligerents, but it must itself abstain from such commerce. In the law of peace the same principle applies. The government must abstain from authorizing the use of force outside of its territory or intervening in the affairs of foreign governments, but it is not responsible, if its subjects do such acts abroad, without authorization.¹ For acts within its territory the responsibility is much greater and hence also is the duty of prevention. For acts of public officers either in its territory or abroad the responsibility of the government is much greater than in the case of private persons, and hence the duty of prevention is more arduous. We may therefore conveniently consider the subject in reference, (1) to agencies of government, and (2) to the civil population. Although the international duties imposed by

¹See Moore's Digest, 6;787. The United States does recognize a certain responsibility for acts of its citizens in promoting insurrection against states in which it has consular jurisdiction, even when committed abroad. The immunity of United States citizens from local jurisdiction in such cases is accountable for this exception to the general rule. See Rev. Stat. sec. 4090, 4102. *Infra* p. 74.

treaties are considered in connection with corresponding duties of international law, the general duty of (3) preventing infractions of treaty provisions may conveniently be considered here.

ACTS BY AGENCIES OF GOVERNMENT.

(1) The agencies of government which come in contact with foreign nations in time of peace are the navy, the diplomatic service and the consular service. International law requires that naval vessels obey local regulations on entering foreign jurisdiction, abstain from prohibited acts, and exchange salutes on meeting foreign public vessels. Special duties, when enjoying the hospitality of ports, such as refusing asylum to criminals, slaves and political refugees, are sometimes required by treaty. These duties are specified in the permanent navy regulations and naval instructions² issued under authority of the president, and are enforced by the executive control exercised over the navy at all times by the president as commander-in-chief, through the navy department, and the authority of courts martial in enforcing the statutory articles for the government of the navy.³

A case involving the enforcement of navy regulations arose in 1893. During the naval revolt in Brazil, Commodore Stanton, an American naval commander, on entering the port of Rio Janeiro, exchanged visits and fired salutes in honor of the naval insurgents. The Brazilian government protested and the navy department on investigation found that Commodore Stanton had violated article 115 of the Navy Regulations of 1893, providing that "no salute shall be fired in honor of any nation * * not formally recognized by the government of the United States." As the offense was due to mistake rather than intent the department, although holding that Commodore Stanton had committed "a grave error of judgment," restored him to his command.⁴

Armed forces are forbidden passing into foreign territory without license, and on such occasions continue subject to military commissions, and army officers are required to observe certain formalities in dealing with representatives of foreign governments.⁵

²Navy Regulations, 1913 sec. 1502, 1633-1634, 1641-1651 under authority of Rev. Stat. sec. 1547.

³Rev. Stat. sec. 1624.

⁴See Moore's Digest, 1;240-241.

⁵Dig. op. Judge. Ad. Gen. 1912, C. R. Howland ed. pp. 90, 106. Army Regulations, 1913, sec. 398; 407; 889, ch. 3.

(2) Diplomatic officers are likewise subjected to duties while in foreign countries. International law requires diplomatic officers to observe diplomatic etiquette, in making visits, being admitted to audiences and in matters of precedence. It requires abstention from public addresses or expressions of opinion likely to be offensive to the state to which the minister is accredited, and it seems that modern international law requires the minister to prevent his residence being used as a place of asylum by fugitives from justice. This duty is also specified in a number of treaties. In exchange for his immunity from local jurisdiction the diplomatic officer is also required to be especially strict in his observance of local laws. These duties are specified with considerable definiteness in the Instructions to Diplomatic Officers⁶ issued by the president under authority of statute,⁷ and a number of them are specified in the statutes themselves. Thus statutes specifically forbid ministers to correspond or give information relating to the affairs of the foreign government to which they are accredited to any but the proper United States officials,⁸ and specify a number of matters relating to costume, absence from post, correspondence,⁹ etc.

The permanent instructions and statutes as well as special instructions issued by the president or secretary of state¹⁰ are enforced by executive control of the ministers' tenure of office, requirements of bonds on acceptance of mission, and criminal liability for misconduct in office.

By the constitution the president with the advice and consent of the senate has the power of appointing diplomatic officers,¹¹ although special agents have been appointed by the president alone.¹² By statute such appointments (or rather salaries for appointees) are limited to citizens of the United States,¹³ and provision has been made to prevent the performance of diplomatic functions by unofficial representatives by making such acts criminal.¹⁴

⁶Instructions to Diplomatic Officers, 1897, sec. 1-136.

⁷Rev. Stat. sec. 1752.

⁸Act Aug. 18, 1850. Rev. Stat. 1751.

⁹Rev. Stat. sec. 1674-1688.

¹⁰See Moore's Digest, 5:565.

¹¹Constitution, Art. 2 sec. 2, Cl. 2.

¹²See Moore's Digest, 4:412.

¹³Rev. Stat. 1744; Moore's Digest, 4:457.

¹⁴Act Jan. 30, 1799; Rev. Stat. 5335. This act resulted from the efforts of Dr. Geo. Logan, who attempted on his own responsibility a

Ministers are required by statute to give bond for the faithful performance of their duties, and it has been held that the appointment is not complete until the execution of this bond.¹⁵ Diplomatic officers are subject to special orders of the president generally transmitted through the department of state, and the president may recall such officers at discretion. By statute diplomatic officers have been made responsible for negligence and misconduct in office.¹⁶ Criminal prosecution in United States courts for violation of statutory duties would therefore seem possible.

(3) International law imposes duties upon consuls while in service in foreign territory. They may not enter upon their functions until they have received an exequatur from the government to which they are assigned, and they are bound by its terms. They must observe the local law,¹⁷ although by treaty they are generally exempted from military and jury service, etc. Consulates are frequently declared immune from local jurisdiction by treaty, but it is also a rule of most of these treaties that the consul must refuse to give asylum to persons sought by local authorities.¹⁸

These duties of consuls are specified in detail in the Consular regulations issued by the president under authority of statute,¹⁹ and a number of them are specified in the statutes themselves.²⁰ These regulations and statutes are enforced through the executive control exercised over consuls by the president through the department of state, by requirements of bonds and by amenability to criminal prosecutions in the United States for acts done abroad.

Consuls are appointed by the president with the advice and consent of the senate,²¹ and it appears that inferior consular

mission of conciliation in France in 1798. It is known as the "Logan Act." There have been no prosecutions under it. See Moore's Digest, 4;448-450. Reference is made to the act in *U. S. vs. Craig*, 28 Fed. Rep. 795, 801; *American Banana Co., vs. United Fruit Co.*, 213 U. S. 347, 356.

¹⁵*Williams vs. U. S.* 23 Ct. Cl. 46; Moore's Digest, 4;457. On liability of bondsman, see *U. S. vs. Bee*, 4 C. C. A. 219.

¹⁶Act. June 27, 1860, Rev. Stat. 4110; See also Rev. Stat. sec. 1734; act Dec. 21, 1898, 30 Stat. 771.

¹⁷See Moore's Digest, 5;698.

¹⁸*Supra*, p. 54.

¹⁹See Consular Regulations, 1896. Duties under International law, sec. 71-76; under treaties, 77-93; under authority of Rev. Stat. sec. 1752.

²⁰Rev. Stat. sec. 1751-1752; 1716-1737; Act June 30, 1902, 32 Stat. 547.

²¹Constitution, art. 2, sec. 2; Cl. 2.

officers may be appointed by the president alone or even by diplomatic or superior consular officers.²² According to a statute of 1906,²³ only American citizens may be appointed to positions with a salary of \$1,000 a year or more. A limited application of the civil service principle in making appointments has been put into operation by executive order.²⁴ Consuls are subject to special instructions of the department of state and the president, and may be removed at the president's discretion.

Consuls are required by statute to give bond for the faithful performance of their duties and they are subject to criminal prosecution in the United States courts for specified acts committed abroad such as accepting appointments as administrator without giving bond or account of money, exacting excessive fees, making false oath, neglecting duty toward seamen, making false certification of property,²⁵ etc., as well as for general misconduct in office.²⁶

The international duties of these governmental agents are enforced largely through methods of executive control. The executive orders and instructions prescribing the conduct of such officers are specifically authorized by statute and are to be regarded as law²⁷ which may be effectively enforced through the appointment and removal power of the executive. The requirements of bonds, the amenability of naval officers to courts martial, and of consular and diplomatic officials to the criminal jurisdiction of American courts for specified statutory offenses, add further sanction to the enforcement of these duties.

ACTS BY THE CIVIL POPULATION.

Governments are not generally responsible for acts by private citizens committed abroad or on the high seas.²⁸ Private

²²Act. Apr. 5, 1906, sec. 2, 3; Consular Regulations, 1888, sec. 8, 7; 1896; sec. 21. See *U. S. vs. Eaton*, 169 U. S. 331. Moore's Digest, 5; 8-9.

²³Act Apr. 5, 1906, sec. 5; Moore's Digest, 5; 12.

²⁴Ex. Ord. June 27, 1906; Dec. 12, 1906; Apr. 20, 1907; Dec. 23, 1910. under authority Rev. Stat. sec. 1753, Act Apr. 5, 1906, and May 11, 1908. See Information Regarding Appointments and Promotions in the Consular Service of the United States, Govt. Printing Office.

²⁵Rev. Stat. sec. 1716, 1728, 1734-1737; act Dec. 21, 1898, 30 stat. 771; act June 30, 1902, 32 stat. 547.

²⁶Act June 22, 1860, rev. stat. sec. 4110; Moore's Digest, 2; 267, note.

²⁷See Rev. Stat. sec. 1752. On legal status of executive orders and regulations, see J. A. Fairlie, *The National Administration of the United States of America*, N. Y. 1905, p. 27.

²⁸See Moore's Digest, 6; 787.

individuals in such cases are amenable to the jurisdiction of the courts of the foreign government, or if they commit piracy on the high seas to those of any government catching them. They may be punished, but their government can not be held responsible for their acts, and no reparation may be demanded. This principle does not apply in countries where citizens are exempt from local jurisdiction by treaty, and consequently in such places the responsibility of the government of nationality continues, to a limited extent.

There has been some difference of opinion as to whether a state is responsible for the acts of private citizens even within its territory, but the doctrine of responsibility appears to be established.²⁹ A state is supposed to maintain order and protect life and property within its territory. It therefore is liable to make reparation for failure to do so if such failure results in an injury to a foreign state or its citizens.

This principle is subject to exceptions. Where insurrections are of considerable magnitude or where the country is invaded by hostile forces, incidental injury to aliens is beyond the power of the government to prevent, and the government is therefore not responsible. The general principle, however, is as stated, and clearly implies a duty on the part of the state to prevent acts injurious to foreign states or persons being committed by its civil population.

The subject may be considered under the three heads, (1) injury to foreign states, (2) injury to resident foreign public officers, (3) injury to alien private persons.

(1) International law requires a government to prevent persons within its jurisdiction doing acts directly injurious to foreign states. The supreme court of the United States has held³⁰ that the measure of this duty is "due diligence" and that as foreign relations are exclusively in the hands of the national government, legislation punishing acts directed against foreign governments is warranted under the constitutional authority to "define and punish * * offenses against the law of nations."³¹ By treaty the United States has recognized its obligation to prevent injury to adjacent states by hostile bands of

²⁹See article by Julius Goebel, Jr., *The International Responsibility of states for injuries sustained by aliens on account of mob violence, insurrection and civil war*. *Am. Jour. of Int. Law*. 8;802, Nov. 1914.

³⁰*U. S. vs. Arjona*, 120 U. S. 479, (1887), *Moore's Digest*, 1;61.

³¹*Constitution*, art. I, sec. 8, cl. 10.

Indians, and forcible measures have been taken to suppress such marauding bands.³² The manufacture or uttering of counterfeit foreign money or bank notes is made a crime by national statutes,³³ and the courts have declared that such acts are prohibited by international law.³⁴ Transporting dynamite and other explosives from the United States in vessels bound to foreign countries except in the manner provided by statute is also made a crime.³⁵

The duty to protect foreign governments against dangerous characters entering under false passports is recognized by making the issuance of passports by unauthorized persons a crime.³⁶ The duty of assisting the administration of justice in foreign countries and preventing frauds upon it by persons in the United States is recognized through provisions requiring certain United States officials to respond to letters rogatory from foreign governments requesting testimony in cases in which that government is interested, by issuing process to obtain such testimony from residents. The failure to respond to such summons, on the part of residents of the country, is made a penal offense.³⁷

³²Treaties with Spain, 1795-1902, art. 5, Malloy, p. 1642; Mexico, 1831-1853, art. 33, p. 1095; 1848-1853, art. 11, p. 1112. The government of Mexico protested that the United States was not fulfilling these treaty obligations, but at a mixed commission arbitration under treaty of 1868, Malloy, p. 1128, the Mexican claim was not allowed. See Moore, *Int. Arb.* 3;2430; Moore's Digest, 2;434. By treaty of 1853, art. 2, p. 1122, the United States was released from this obligation to Mexico. But in protocols from 1882 to 1896, reciprocal permission was given to pursue marauding Indians across the boundaries of the two countries. Correspondence has taken place in reference to the suppression of Indians on the Canadian frontier, but no treaty was negotiated. See Moore's Digest, 2;434-442.

³³Act, May 16, 1882, 23 Stat. 22; Penal Code of 1910, Act, Mch. 21, 1909, 35 Stat. 1088, in force Jan. 1, 1910, sec. 156-162. Printed with annotations, G. B. Tucker and C. W. Blood, *The Federal Penal Code of 1910*.

³⁴*U. S. vs. Arjona*, 120 U. S. 479. Moore's Digest, 1;61;2, 450. A similar view was taken in an English case, *Emperor of Austria vs. Day and Kossuth*, 2 Giff. 628, (1861), in which an injunction was issued to restrain counterfeiting of Hungarian securities on the ground that the law of nations, which is part of the law of England, requires one nation to protect the prerogative privilege of a foreign sovereign to issue money.

³⁵Rev. Stat. sec. 4278, 5353; Act, May 30, 1908, 35 Stat. 554, Penal Code of 1910, sec. 232; Moore's Digest, 2;431.

³⁶Rev. Stat. 4078, Act of June 14, 1902, 30 Stat. 386.

³⁷Rev. Stat. 4071-4083, 771-875; Moore's Digest, 2;104-113.

A further recognition of this duty is found in the statute giving consular courts jurisdiction of acts by American citizens promoting insurrection against the state in which they are located. Such offenses may be punished by death provided the consul and his associates agree and the United States minister gives his approval.³⁸ The American minister is also authorized to use the military or naval forces of the United States to prevent American citizens participating in such insurrections.³⁹ This extension of the duty to prevent injury to foreign states by private persons—to acts committed in foreign countries—is one exception to the rule. The exemption of United States citizens from local jurisdiction in countries granting extraterritorial consular jurisdiction, however, imposes the duty of prevention upon the United States in such cases. American citizens continue under the jurisdiction of the United States even though resident abroad, so it continues to be responsible for their acts.

With the doctrine that the federal courts have no common law criminal jurisdiction, acts injurious to foreign governments can not be prevented through the imposition of criminal penalties by federal courts, except in cases covered by statutes. Although congress has the power to cover completely the field of such penal legislation through its power to punish offenses against the law of nations, the offenses actually covered are comparatively few. The president undoubtedly has power to take preventive measures in matters covered by treaty, and as to duties required by international law in his general control of foreign relations, but a large part of the duty of prevention in this respect remains with the state governments. State courts may assume a jurisdiction over any act injurious to foreign governments according to the common law, and through their general police power the state governments may prevent attempts or plots with such aims in view.⁴⁰

Controversy has arisen respecting the injury of water power locations in one country by depletion or diversion of the river in an adjacent country. It has been held that such acts are cognizable in state courts when proceedings are instituted by citizens of another state of the union, and probably a similar rule would apply in reference to like injuries to foreign states.⁴¹

³⁸Rev. Stat. sec. 4102.

³⁹Act, Jan. 16, 1860, 12 Stat. 77; Rev. Stat. 4090.

⁴⁰Moore's Digest, 2;432.

⁴¹Stillman vs. Man. Co., 3 Wood and M. 538; Foot vs. Edwards, 2 Blatch. 310; Miss. and Mo. R. R. vs. Ward, 2 Black 485; Wooster vs. Man.

After the assassination of President McKinley, there was diplomatic agitation for the passage of uniform laws preventing anarchistic plots, and President Roosevelt, in his message of Dec. 3, 1901, recommended legislation by congress.⁴² No national statutes, except those excluding anarchists from entering the United States,⁴³ bear on the point, but state laws may prevent anarchistic agitation and also plots to commit other varieties of crime abroad. In a letter of Secretary Bayard in 1885,⁴⁴ in reply to a communication from the British government asking whether participation in the Irish National League was not punishable under the United States laws, it was stated that no national statutes penalized such offenses against foreign governments, but "if any person in the state of Pennsylvania take measures to perpetrate a crime in a foreign land, such an attempt, coupled with preparation to effectuate it, though not cognizable in the federal courts, is cognizable in the courts of the state of Pennsylvania. It is only necessary, to obtain legal action in such prosecution, that an oath specifying the offense be made before a state magistrate, and the state prosecuting attorney having jurisdiction of the locality notified of the initiation of proceedings."⁴⁵

(2) Certain foreign public officers are entitled to special protection by international law; consequently a special duty of prevention is incumbent upon the government in relation to them. Diplomatic agents are the most important of these privileged foreign officers.

In 1784 the court of oyer and terminer of Philadelphia in *Res Publica vs. De Longchamps*⁴⁶ declared the person of a public minister "sacred and inviolable." "Whoever," said the court, "offers any violence to him not only affronts the sovereign he represents but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world." It added that the "comites" and household of the minister are like-

Co., 31 Me. 246; In re Eldred, 46 Wis. 530; Thayer vs. Brooks, 17 Ohio, 489; Armendíaz vs. Stillman, 54 Tex. 623; See Moore's Digest, 2;451.

⁴²See Moore's Digest, 4;95-96: 2;432-434.

⁴³Act, Mch. 3, 1903, 32 Stat. 12, 13. See *Turner vs. Williams*, 194, U. S. 279, (1904).

⁴⁴See Moore's Digest, 2;432.

⁴⁵The prevention of acts injurious to foreign states in time of war while the United States is neutral is provided for in neutrality statutes. See *infra* p. 114 et seq.

⁴⁶1 Dall. 111, (1784); Moore's Digest, 4;622.

wise inviolable. In cases involving public ministers the court held that the law of nations should be applied, and in pursuance of this principle found De Longchamps criminally liable for an assault upon the Secretary of the French Legation. Much difficulty was experienced by the court in reconciling its duties as a municipal court with those as a court of international law. In the former capacity it must give a definite sentence, in the latter it must give a sentence satisfactory to the injured party, the king of France. It finally concluded that "the defendant can not be imprisoned until his most Christian Majesty shall declare that the reparation is satisfactory." Apparently a *de facto* incarceration without formal sentence of imprisonment, which if given at all would have to be "certain and definite," seemed the only way out of the dilemma.

This view of the status of municipal courts in performing such duties, based on Lord Mansfield's opinion in *Triquet vs. Bath*,⁴⁷ and the English treatment of the case of the Russian Ambassador in 1708,⁴⁸ is probably now obsolete. The state's duty is to prevent injury to diplomatic agents by any suitable means. The criminal prosecution and the kind of punishment imposed on persons assaulting ministers are thus not specified by international law. Such measures are law supplementary to international law.

By a statute of 1790⁴⁹ the "offering of violence to the person of a public minister, in violation of the law of nations" is punishable by imprisonment for not over three years, and fine at the discretion of the court. This act includes assaults upon members of the minister's household and upon his residence.⁵⁰ Appar-

⁴⁷*Triquet vs. Bath*, 3 Burr 1478, (1764), Scott, 6.

⁴⁸The arrest of the Ambassador of the Czar of Russia in 1708 gave rise to high feeling on the part of that potentate which was finally assuaged by sending a handsomely illuminated apology prepared for the occasion. As a result of this case a statute, 7 Ann 12, (1708); Scott, p. 4, was passed, to prevent other such occurrences in the future.

⁴⁹Act Apr. 30, 1790, 1 Stat. 118, Rev. Stat. 4062-4065.

⁵⁰*U. S. vs. Hand*, 2 Wash. C. C. 435; See also on scope of act, *U. S. vs. Ortega*, 11 Wheat. 467; *Black Att. Gen.* 9 op. 7, (1857); *U. S. vs. Liddle*, 2 Wash. C. C. 205, (1808); *In re Baiz*, 135 U. S. 403, (1889). Similar statute in Great Britain, 7 Ann 12, printed Scott, 4; and *Cross vs. Talbot*, 8 Mod. 288; *Triquet vs. Bath*, 3 Burr, 1478. (1764); *Heathfield vs. Chilton*, 4 Burr. 2015, (1767); *Parkinson vs. Potter*, L. R. 10 Q. B. 152, (1885); *McCartney vs. Garbutt*, 24 Q. B. D. 36, (1890) Scott 191-196; *Moore's Digest*, 4;622-628.

ently it does not include the sending of anonymous and threatening letters to a minister. In 1793, in the case of *U. S. vs. Ravara*,⁵¹ tried in the United States circuit court at Philadelphia, although the statute was in force the offender was indicted at common law for sending such letters to the British minister. The court, consisting of Justices Jay and Peters, found him guilty. With the present view that federal courts have no common law jurisdiction, such a prosecution would now be impossible in the federal courts.

The duties of prevention do not stop with the protection from personal injury of the minister and his household. His jurisdictional immunity must also be protected. The courts are forbidden by statute⁵² to take jurisdiction of either criminal or civil cases against public ministers or their servants, and persons executing process on such privileged characters are declared "violators of the law of nations" and subject to criminal punishment. This statute has been enforced by the courts in a number of cases.⁵³ Foreign consuls,⁵⁴ naval officers,⁵⁵ and persons in the military forces⁵⁶ have been held not to enjoy such immunities and are not included in the terms of the statute mentioned. Such officers are given no protection other than that accorded aliens, except in so far as special treaties provide. They are, however, recognized as being exempt from personal liability to a limited extent for acts done under authority of their government. They are therefore protected from prosecution in the state courts by an act giving the federal courts power to release from the state courts on habeas corpus, subjects of foreign states in custody for acts done, "under any alleged right, title, authority, privilege, protec-

⁵¹*U. S. vs. Ravara*, 2 Dall. 297, (1794); Fed. Cas. 16, 122. The defendant in this case was a Genoese Consul but the court held that no immunity from prosecution attached to this position. He was ultimately pardoned on condition that he give up his exequatur. See Moore's Digest, 5:65. See also Bradford, Att. Gen., 1 op. 52, (1794); Lee Att. Gen., 1 op. 71; (1797); Moore's Digest, 4:629-630.

⁵²Act, Apr. 30, 1790; 1 Stat. 117, Rev. Stat. 4063-4064. The Supreme court is authorized to issue writs of mandamus to courts or public officers of the United States in cases where ambassadors, public ministers, consuls or vice-consuls are parties. Judicial Code, 1911, 36 Stat. 1087, sec. 234.

⁵³*Ex Parte Cabrera*, 1 Wash. C. C. 232; *U. S. vs. Benner*, Baldwin 234; Moore's Digest, 4:631-635.

⁵⁴*In re Baiz*, 135 U. S. 403, (1899).

⁵⁵Bradford Att. Gen., 1 op. 49, (1794); Nelson Att. Gen. 4 op. 336, (1844).

⁵⁶*People vs. McLeod* 25 Wend. 483; See also 26 Wend. 663.

tion, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depends upon the law of nations."⁵⁷

Where consulates are declared inviolable by treaty and public vessels are in port, the government is under an obligation to prevent violation of such places. The usual method of keeping order by the police and, if necessary, by the employment of armed force, serve to fulfill this duty.⁵⁸

(3) It has been officially held in the United States that resident aliens owe temporary allegiance to the government, must submit to its laws,⁵⁹ are entitled to the judicial remedies for wrongs open to citizens,⁶⁰ but that the United States government is not responsible for injuries to them by acts of private trespassers.⁶¹ The alien must get his remedy by the usual legal processes or not at all. This view, it will be seen, puts aliens on the same legal footing as citizens. They have no immunities or advantages. In fact their rights are less secure than those of citizens, for they do not enjoy political privileges, and by the alien act⁶² in force from 1798 to 1801 they were liable to expulsion by

⁵⁷Act, Aug. 29, 1842, Rev. Stat. sec. 753. This act resulted from the inability of national authority to liberate McLeod, on trial for murder in New York. The British government and the political department of the U. S. government took the view that his act, done as a soldier and recognized by the British government, was one for diplomatic reparation, and personal liability could not attach. See Moore's Digest, 2;24-30.

⁵⁸The President may use the military and naval forces of the government and call out the militia to repel invasion, suppress insurrection and execute the laws of the Union. This includes the execution of treaties. See Act, Mch. 3, 1827, in re military and naval forces, and act, May 2, 1792, Jan. 21, 1903, Feb. 16, 1914, in re the militia, under authority of constitution, art. 1, sec. 8, cl. 14.

⁵⁹Carlisle vs. U. S. 16 Wall. 147; Moore's Digest, 4; 9-17.

⁶⁰Cushing, Att. Gen. 7 op. 229, (1855); Taylor vs. Carpenter, 3 Story, 458; Breedlove vs. Nicolle, 7 Pet. 413; Moore's Digest, 4;7.

⁶¹Nelson Att. Gen., 4 op. 332, (1844); The Resolution, Fed. Court of Appeals, 2 Dall. 1, (1781); Lincoln Att. Gen., 1 op. 106, (1802); Moore's Digest, 4;7; 6;787-791.

⁶²Act, June 25, 1798, 1 Stat. 570, to be in force two years. Expulsion within three years of landing of excluded classes is permitted in the present immigration laws, Act, Mch. 3, 1903, 32 Stat. 1213, sec. 20, 21; Moore's Digest, 4;172. This however, is really a measure to enforce the exclusion of undesirable classes and should be distinguished from acts providing for *expulsion* of aliens, common in Europe, but represented in the United States by the single instance mentioned.

order of the president. This view denies the doctrine of international responsibility for the safety of resident aliens, yet is the one generally expressed by the United States government. When reparation has been made by the government it has been as a "gratuity." It has been denied that the government was under an obligation of international law to prevent injuries to aliens or to make reparation.⁶³

This opinion to the contrary, it seems clear that responsibility is recognized in practice as a rule of international law.⁶⁴ The principle is recognized by a number of state governments in laws making counties responsible for property losses and damages caused by mob violence.⁶⁵ Even though the United States denies the theory in principle, it has generally observed it in practice. We may therefore consider the measures taken to prevent injury to aliens.

By statute it is provided that persons violating safe conducts or passports of aliens shall be criminally liable in the federal courts.⁶⁶ In numerous treaties rights of resident aliens are specified, extending to such matters as protection of life and property, right to own land, to make devises and bequests, and to have recourse to local courts of justice. In some of them it is specified that subjects of the contracting powers shall have the same rights as citizens when in the United States, and most favored nation rights are frequently guaranteed to subjects of the respective powers. Treaty rights of this character are protected by the courts applying treaties as law.⁶⁷

The courts have held that aliens within the territory are entitled to the same protection in their personal rights as citizens and no more,⁶⁸ and this has been the principle generally acted upon in preventing injuries even when treaties do not specify such a privilege. The constitutional guarantees operate to pro-

⁶³See Letter of Mr. Bayard, Sec. of State, 1886, For. Rel. 1886, p. 158, Moore's Digest, 4;826-835. See Act, June 8, 1896, Moore's Digest, 4;850.

⁶⁴See Article by Julius Goebel, Jr., The International Responsibility of states for injuries sustained by aliens on account of mob violence, insurrection and civil war, Am. Jour. of Int. Law, 8;802, Nov. 1914.

⁶⁵Illinois Rev. Stat., 1913, c. 38, sec. 256a-256g-256w; pp. 854, 857.

⁶⁶Act, Apr. 30, 1790, 1 Stat. 118, Rev. Stat. sec. 4063; Moore's Digest, 4;623.

⁶⁷Hauenstein vs. Lynham, 100 U. S. 483.

⁶⁸Butler Att. Gen. 3 op. 254, (1837); People vs. Warren, 11 N. Y. Cr. R. 433; Moore's Digest, 4;2.

tect aliens resident in the country, though they are not effective to prevent arbitrary administrative methods in excluding aliens before arrival⁶⁹ or expelling those illegally entering.⁷⁰

The ordinary exercise of the police power, prevention of injury to persons, and punishment of offenders is in the hands of the state governments. It is therefore upon them that the duty of preventing injury to aliens largely devolves. The principle that treaties are enforceable law enunciated by the constitution is binding upon state as well as federal courts, and states have enforced the treaty rights of aliens in cases coming before them subject to the right of appeal to the United States supreme court should such rights be neglected. A similar control may be exercised in respect to the general protection of property and personal rights by such constitutional guarantees as those prohibiting state laws "impairing the obligation of contracts", or taking life, liberty or property without "due process of law." Thus the national government can in a measure prevent the confiscation of contract debts of foreigners, a matter which has been of international importance especially in Latin American countries, although it is not clear that international law imposes such a duty.⁷¹ But in the punishment and control of private individuals violating rights of aliens, either guaranteed by treaty or by international law, no such method of federal control over the state government exists. The international responsibility falls upon the national government. It has therefore sometimes happened that the national government has made reparation for failure on the part of the states to perform this duty of prevention even though it had by law no means of controlling the states or offering adequate protection itself.

During the decade from 1890 to 1900 a number of cases arose in which Italians were murdered or injured by mobs and in which the state authorities appear to have been lax in performing their duties of prevention. Presidents Harrison and McKinley strongly urged congress to enact laws giving the federal courts jurisdiction of cases involving injury to aliens, especially where treaty rights were involved, as was the case in the

⁶⁹U. S. vs. Williams, 194 U. S. 292; U. S. vs. JuToy, 198 U. S. 253, 263.

⁷⁰Zakonite vs. Wolf, 226, U. S. 212.

⁷¹Constitution, art. 2, sec. 10, cl. 1; amendment 14, in reference to states and amendment 5, in reference to Congress. The United States has generally refused to prosecute claims of its citizens based on contract, even where the contract was with the foreign government itself. See Moore's Digest 6;705-738, 6;285-289.

Italian outrages.⁷² It seems that there is adequate constitutional basis for such legislation, both in the implied power of the national government to enforce treaties which it may constitutionally conclude, and in the power to define and punish offenses against the law of nations. W. W. Willoughby has said in this connection, "There would seem to be no valid constitutional objection to an act of congress giving to the federal courts cognizance of all offenses for which the United States may according to the law of nations be held responsible to foreign powers."⁷³

INFRACTION OF TREATIES

(1) Treaties may be declaratory of international law, in which case the contracting states have no more rights and no more duties than they would have under international law. They may be amendatory of international law, such as general international conventions, in which case, after ratification, their provisions are international law and the contracting states are under new duties according to them. Or they may create exceptions to the general rule of international law, being in nature similar to contracts. In some such treaties the national obligations are made greater than under international law, as in treaties guaranteeing special protection to aliens or special protection to territory such as Panama and Cuba. In other cases the national duties are made less than they would be under international law. The protocols with Mexico relating to Indian marauders and the capitulations of Turkey and other non-Christian countries reduce the usual obligations of abstaining from exercising force and jurisdiction in foreign territory, although they add new obligations incidental to the exercise of these privileges.

Treaty stipulations are considered in this thesis in connection with the rules of international law to which they relate, the general view being taken that treaties when duly ratified are *ex propria vigore* municipal law, and whichever one of these classes they fall into they will be enforced as such by United States courts or executive officials.

⁷²Pres. Harrison's Message, Dec. 9, 1891, For. Rel. 1891, v; Moore's Digest, 6;840; Pres. McKinley's Message, Dec. 5, 1899, For. Rel. 1899, xxii, Moore's Digest, 6;846; Dec. 3, 1900, For. Rel., 1900, xxii. Moore's Digest, 6;874.

⁷³W. W. Willoughby, *The Am. Const. System*, N. Y., 1904, p. 108. See also *U. S. vs. Arjona*, 120 U. S., 479, (1887), on the subject, also E. S. Corwin, *National Supremacy*, N. Y. 1913.

At this point the subject matter of treaties will not be considered, but rather the general method of treaty enforcement—the measures which the United States has taken to prevent the infraction of treaties.

(2) The most important provision of this character is found in the constitution of the United States, which declares that, “this constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or law of any state to the contrary notwithstanding.”⁷⁴

What agreements are treaties in the meaning of this provision is a question of municipal law. The constitution requires that two-thirds of the senate concur with the president in making treaties;⁷⁵ it therefore seems that executive agreements, of which a considerable number have been concluded by the president alone,⁷⁶ would not be “the supreme law of the land” in this sense. There is undoubtedly a limit to the scope of the treaty power, from the constitutional division of power between state and national government, but where the line is to be drawn has not been defined. It certainly appears to extend beyond the legislative power of congress.⁷⁷ Ratification and proclamation also appear to be necessary before a treaty is valid in the sense of the constitution.⁷⁸ Even when these conditions are complied with and from a technical standpoint the treaty is clearly within the terms of the constitutional provision there are important limitations to its full effect as municipal law in the sense of that term as adopted in this thesis.

In this connection the dual character of the obligation imposed by treaties must be borne in mind. A treaty primarily creates obligations between states. The recognized representative of the state, that is its government, may alone be held responsible for the infraction of treaties so far as the other contracting parties are concerned. This is the only function of

⁷⁴Constitution, art. 2, sec. 2, cl. 2.

⁷⁵Constitution, art. 2, sec. 2, cl. 2.

⁷⁶See Moore's Digest, 5:210-218.

⁷⁷*Chirac vs. Chirac*, 2 Wheat. 259, 276, (1817); *Geofroy vs. Riggs*, 133 U. S. 258; *Hauenstein vs. Lynham*, 100 U. S. 483. *Contra Prevost vs. Greneaux*, 19 How. 1; Moore's Digest, 5:166; 175-179.

⁷⁸See Moore's Digest, 5:202-210.

treaties in many countries including Great Britain. It is for the political department of the government to decide upon and enact appropriate measures for putting them into effect. Private rights under municipal law are not affected until such action is taken.⁷⁹

In the United States, however, aside from this primary obligation imposed upon the government, treaties often impose obligations immediately upon individuals. The constitution has declared, in order to provide for the performance of the duty by the government, that treaties are law and immediately effective in altering private rights and liabilities, and the courts must take cognizance of them in that capacity. Thus in England if the government wishes to escape liability for infractions of treaties stipulating a change in private rights it must always pass statutes providing for their enforcement. In the United States this burden is shifted from congress by the constitutional provision, although in some cases additional legislation may be necessary, especially where an appropriation of money is required to make the treaty effective.

(3) This secondary function of treaties, however, is governed entirely by municipal law. Hence, although the international obligation of treaties can not be altered except by mutual consent,⁸⁰ the terms of the treaty itself,⁸¹ or, as is generally admitted, by an entire change of the conditions upon which the treaty was founded,⁸² the obligations of individuals and officers of government under it, are always subject to the will of the sovereign. An act of congress specifically abrogating a treaty,⁸³ or a subsequent and conflicting statute by that body,⁸⁴ will abrogate

⁷⁹See Holland, *Studies in International Law*, p. 190-193, Westlake, *Is International Law Part of the Law of England?* L. Q. R. 22; 14.

⁸⁰See Moore's Digest, 5;319-322; 363-364.

⁸¹See Moore's Digest, 5;322-335.

⁸²See Moore's Digest, 5;355-356. This principle is generally spoken of as the implied reservation 'contained in all treaties of "*rebus sic stantibus*." "There will be no state in the position to conclude a treaty for all time wherein lies a perpetual limitation of its own sovereignty." Heinrich Treitschke, *Politik*, Leipsic, 1899, 2;550.

⁸³Act July 7, 1798, 1 stat. 578, abrogating French treaty of 1778. Moore's Digest, 5;356-363.

⁸⁴Head Money Cases, 112 U. S. 580; *Whitney vs. Robertson*, 124 U. S. 190, (1888); *The Chinese Exclusion Cases*, 130 U. S. 581, (1889); *Homer vs. U. S.*, 143 U. S. 570; *LaAbra Silver Mining Co., vs. U. S.* 173 U. S. 423, 460, (1899); Moore's Digest, 5;364-370.

a treaty so far as municipal law is concerned, although vested rights created under it will be protected by constitutional guarantees in the same manner as vested rights under repealed statutes.⁸⁵ The observance of a treaty, although a duty of international law, is a political question subject to the discretion of the sovereign and beyond the power of municipal law to control. However, by requiring that any such statute be unequivocal and incapable of reconciliation with the treaty by interpretation,⁸⁶ the courts of the United States can do much toward enforcing the duty of the government not to abrogate treaties. Applying this principle, United States courts have held that war does not terminate treaties. It suspends them in respect to private rights of enemy persons and brings them into effect in respect to provisions specifically related to rights during war.⁸⁷

In addition to the power of the political department of the government to terminate treaties it also has exclusive control of many treaty provisions which are by their nature incapable of enforcement by municipal law. Treaty obligations to pay money, to cede territory, to enact laws, to enter into constructive enterprises such as the Panama Canal or to make a particular disposition of military and naval forces are addressed to the political department of the government. The courts hold them political questions and will follow the political department in interpreting them.⁸⁸ They can not be enforced as municipal law.

The only treaty provisions which are law actually enforceable by regularly constituted municipal authorities are those

⁸⁵*Chirac vs. Chirac*, 2 Wheat. 259, 277, (1817); *Society for the Propagation of the Gospel vs. New Haven*, 8 Wheat. 464; *Carneak vs. Banks*, 10 Wheat. 182; *Moore's Digest*, 5:386-387.

⁸⁶*In re Chin A. On*, 18 Fed. Rep. 506.

⁸⁷*Society for the Propagation of the Gospel vs. New Haven*, 8 Wheat, 464, 494, (1823); *Carneak vs. Banks*, 10 Wheat. 181. Great Britain took a similar view in respect to a statute giving effect to a treaty which in terms was "to continue in force so long as the said treaty between his majesty and the United States should continue in force, and no longer." It was held that the War of 1812 did not terminate the treaty hence the statute remained valid. See 37 Geo. III, c. 97, (1797), in re treaty 1794, art 9, *Sutton vs. Sutton*, 1 Russell and Mylne, 663; *Moore's Digest*, 5:373. The United States did not agree to the Spanish claim that the war of 1808 abrogated all treaties between the two countries. See *Moore's Digest*, 5:375-376.

⁸⁸*Doe vs. Branden*, 16 How. 635; *Foster vs. Neilson*, 2 Pet. 314; *The Amiable Isabella*, 6 Wheat. 1; *Bottiller vs. Dominguez*, 130 U. S. 238. *Moore's Digest*, 5; 241-242.

parts relating to the control of persons and inferior officers of government within the jurisdiction of the government. This enforcement may be either judicial or executive.

Judicial enforcement is secured by the power to hold invalid legislation or constitutional provisions of states in conflict with treaties,⁸⁹ to compel administrative officials to perform acts by mandamus, or to refrain from action by injunction, and to apply treaties directly as rules of decision in adjudicating private rights, such as privileges granted aliens, and foreign officers resident in the country, prize rights of neutrals and enemies in time of war, etc. By such measures as injunction, the imposition of criminal penalties and civil liability in tort, courts both state and federal may also prevent the infraction of treaty rights of alien persons or foreign states by private persons within their jurisdiction.

Executive authorities may also take measures to enforce treaties directly. It has been held that imprisonment of persons in pursuance of treaty stipulations by executive authorities, in the absence of legislation, judicial process or declaration of martial law, is not an unconstitutional exercise of power nor a deprivation of liberty without due process of law.⁹⁰ It would thus seem that executive measures appropriate to the fulfillment of treaty obligations may be effectively used under no authority other than the treaty itself.

Legislative authority is necessary to make treaties effective in many cases, especially in those requiring an expenditure of money.⁹¹ It is generally considered to be a duty of congress to act where its aid is required,⁹² but in the case of a treaty with Mexico of 1883, providing that necessary legislation should "take place within twelve months from the date of exchange of ratifications,"⁹³ congress failed to perform this duty. In many other cases the enforcement of treaties can be made more effective by

⁸⁹Ware vs. Hylton, 3 Dall. 199, (1796); Chirac vs. Chirac, 2 Wheat. 259; Hauenstein vs. Lynham, 100 U. S. 483; Gordon vs. Kerr, 1 Wash. C. C. 322; Moore's Digest, 5;371-372.

⁹⁰Ex Parte Toscano, 208 Fed. Rep. 938, (U. S. Circuit Court, Cal. 1913). See also in re Debs, 158 U. S. 564 as illustrating general executive power to safeguard broad general interest, and its application to treaty enforcement by E. S. Corwin, National Supremacy, N. Y., 1913, p. 293.

⁹¹See Moore's Digest, 5;221-223.

⁹²Cushing Att. Gen., 6 op. 296, (1854).

⁹³Treaty with Mexico, 1883, art. 8, Malloy, p. 1151. See Moore's Digest, 5;222.

legislative action. Statutes and orders imposing criminal penalties, creating administrative positions, directing public officers, etc., have often been enacted and promulgated for this purpose.

Rules contained in treaties are similar to those contained in international law in their relation to the municipal law of the United States. In both cases the rules are primarily obligatory upon the government, and in both cases, as a municipal measure to aid in the enforcement of the government's obligations, it is provided that the rules shall be part of municipal law and directly enforceable by courts and executive officers in appropriate cases. In both cases also many of the rules are by their nature incapable of immediate enforcement as municipal law, because the courts can not exercise jurisdiction over the parties or subject matter. In such cases they are political questions, and the national duties under them may be fulfilled through discretionary executive action or the enactment and enforcement of supplementary laws.

CHAPTER V. OBLIGATIONS OF VINDICATION

INTRODUCTORY

The duties of prevention relate to acts committed by private individuals for which the government is responsible, and which it is bound to prevent. The government is not responsible for acts of aliens, but international law sometimes requires it to treat violators of international law, even when they are aliens, in a specified manner. The obligation of states is not limited to the mere negative one of not doing harm to others, but as members of the family of nations they owe at least a moral duty to that society to take measures to promote its general welfare. They must vindicate their sovereignty, when foreigners violate international law in their territory or foreign criminals attempt to find refuge there, by exercising jurisdiction over such persons according to the requirements of international law. And they must vindicate their position in the family of nations by cooperating with other nations in constructive activity for the general good.

Duties of this character are for the most part in a process of becoming, rather than being already established law. In time of peace, customary international law does not require such activity, yet the progress of conventional law, in requiring duties of this character, leads to the belief that some of them may be soon recognized as obligations of the law of nations.

INTERNATIONAL COOPERATION

Such international conventions as those providing for an international bureau of weights and measures,¹ for the international protection of industrial property,² for the protection of submarine cables,³ for the repression of the African slave trade,⁴ for a Universal Postal Union,⁵ for the protection of literary and

¹International Bureau of Weights and Measures, 1875, Malloy, p. 1924.

²Convention for International Protection of Industrial Property, 1883, Malloy, p. 1935.

³Convention for Protection of Submarine Cables, 1884, Malloy, p. 1949.

⁴General Act for the Repression of African Slave Trade, 1890, Malloy, p. 1964.

⁵Universal Postal Conventions, 1891, 1897. Concluded by Act of June 8, 1872. See Moore's Digest, 5;220.

artistic copyrights,⁶ for promoting sanitation and preventing epidemic diseases,⁷ are adhered to by large numbers of states including the United States, and impose duties upon states for the general good of the civilized world. Similar duties are imposed by the Geneva and the Hague conventions, although their rules are largely declaratory of international law and define obligations owed to single states rather than those required for the general good alone. In its most recent interpretation of the Monroe Doctrine the United States appears to have recognized that it must assume certain responsibilities in connection with countries of the Western Hemisphere. The administration of customs duties on several occasions in Latin American countries, for the purpose of paying obligations owed by such countries to European nations, is an illustration of the exercise of this duty;⁸ and the activity of the various Pan-American congresses indicates further special duties connected with the affairs of the new world.⁹

These obligations are spoken of as duties of international co-operation,¹⁰ and the law regulating them as international administrative law.¹¹ There has been a great deal of municipal legislation for enforcing these duties, and judicial opinion interpreting them, but as they are not yet duties imposed by international law aside from convention we will not attempt to consider the subject here.

PREVENTION OF CRIME

There is, however, one duty of a similar character which is so habitually practiced and is so well established that it can almost be said to constitute a real duty of international law. That is the duty to aid in the suppression of the more serious crimes. The power of national courts to exercise extra-territorial jurisdiction

⁶Convention on Literary and Artistic Copyrights, 1902, Malloy, p. 2058.

⁷International Sanitary Convention, 1903, Malloy, p. 2066.

⁸See President Roosevelt's Annual Message, Dec. 6, 1904, For. Rel. 1904, xli; Moore's Digest, 6;596.

⁹Act May 24, 1888, Moore's Digest, 6;599-604. Treaties of the Central American Peace Conference, 1907, Malloy, p. 2391-2400. The duty of preserving order in Cuba and Panama is recognized by treaties, Cuba, 1903, p. 362-4, Panama, 1903, art. 23, p. 1356.

¹⁰See Moore's Digest, 2;466-488.

¹¹See P. S. Reinsch, International Unions and their administration, *Am. Jour. Int. Law*, 1;579-673. (1907): *Int. Adm. Law and National Sovereignty*, *Am. Jour. Int. Law*, 3;145, (1909); *Public Int. Unions*, Boston, 1911; Hershey, *Essentials of Int. Pub. Law*, p. 5, bibliography, p. 14.

on the high seas for the punishment of pirates is well recognized by international law, and it seems that a positive duty to exercise this authority and suppress piracy is likewise fairly established. A government that does not take adequate measures to suppress piracy may expect other governments to intervene and punish pirates even within its jurisdiction.¹² The slave trade conventions have recognized a similar obligation to suppress this commerce. The municipal measures which the United States has taken to perform these duties have been discussed.¹³

Attempts have been made to conclude international conventions requiring states to prevent the emigration of criminals from their territory and to establish international police bureaus for the detection of criminals, but it can not be said that international law as yet imposes obligations of this character.¹⁴ The duty of punishing its own criminals and giving up criminals seeking asylum in its territory to the state where the crime was committed is sometimes considered a duty of international law,¹⁵ and it certainly is a duty very commonly observed. However, the assertion that states are positively required by international law to extradite criminals appears to be erroneous. Extradition is not a duty of international law.¹⁶ In the absence of a treaty, states are not under an obligation to surrender criminals. The duty has, however, been so universally acknowledged by conventional law that a brief consideration of the laws of the United States relating to its enforcement may be appropriate.

EXTRADITION

. That no legal obligation to extradite criminals exists in the absence of treaty has been affirmed by courts and political officers of the United States.¹⁷ There have, however, been some cases of

¹²See the *Amelia Island* case, President Monroe's message, Nov. 17, 1818, Moore's Digest, 1;173: 2;406-408.

¹³Supra, pp. 34-36.

¹⁴Such efforts have been made especially in reference to the suppression of anarchists; see Moore's Digest, 4;95-96: 2;432-434.

¹⁵See Sir. E. Clarke, *A treatise on the Law of Extradition*, 4th ed. 1903, ch. 1; Chancellor Kent, *In Matter of Washburn*, 4 Johns Ch. 105, 107, (N. Y.); Hershey, op. cit., p. 263, note 69.

¹⁶See Moore on Extradition, 1;13-20: Moore's Digest, 4;245.

¹⁷*Commonwealth vs. Deacon*, 10 S. and R. 125; *U. S. vs. Rauscher*, 119 U. S. 407; *Terlinden vs. Ames*, 184 U. S. 270, 289, (1902); Moore's Digest, 4;245-246.

extradition without treaty, but the act has been described as one dictated by courtesy rather than by legal obligation.¹⁸ The international duty recognized by the United States, therefore, is that of obeying the extradition treaties.

(1) Provision for extradition of murderers and forgers was made in the treaty with Great Britain of 1794, in force till 1807.¹⁹ The first general extradition provision was in the Webster-Ashburton treaty of 1842 with Great Britain.²⁰ Since that time treaties have been concluded with almost all important countries,²¹ and they generally specify that persons indicted for the more serious crimes shall be extradited. Express exclusion is ordinarily made of political offenders.²²

Although there have been some state laws providing for extradition to foreign governments,²³ the better opinion seems to be that the national government alone has the power to deliver up fugitives from foreign countries.²⁴ National statutes²⁵ since 1848 have provided for the apprehension and preliminary trial by federal courts of persons whose extradition is requested, although it has been held that, treaties being law, the courts can perform such functions in the absence of statute.²⁶ The courts have held

¹⁸See case of *Arguelles*, Moore on Extradition, 1;33: Moore's Digest, 4;249.

¹⁹Treaty with Great Britain, 1794-1807, art. 27, Malloy, p. 605.

²⁰Treaty with Great Britain, 1842, art. 10, Malloy, p. 655.

²¹Eighty-four treaties with fifty countries have been concluded. The independent states with which there appear to be no treaties at present are as follows: Roumania, Bulgaria, Greece, Montenegro, Paraguay, Uruguay, China, Persia, Siam, Liberia, Abyssinia. There is no extradition treaty with the German Empire, but treaties are in effect with the North German Union and the following states of the empire: Baden, Bavaria, Bremen, Hanover, Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Prussia, Schamberg-Lippe, Wurtemberg.

²²*Ornelas vs. Ruiz*, 161 U. S. 502, (1896); *In re Ezeta*, 62 Fed. Rep. 972; Moore's Digest, 4;332-354.

²³Treaty with Mexico, 1861, art. 2; Law of New York, 1822, p. 134, N. Y. Rev. Stat. 1827, declared unconstitutional in *People vs. Curtis*, 50 N. Y. 321, (1872); Moore on Extradition, 1;53; Moore's Digest, 4;240.

²⁴*Holmes vs. Jennison*, 14 Pet. 540, 579, (1840); *Legare*, Att. Gen. 3 op. 661, (1841); *People vs. Curtis*, 50 N. Y. 321, (1872); *U. S. vs. Rauscher*, 119 U. S. 407, 414, (1886).

²⁵Act. Aug. 12, 1848; 9 Stat. 302, act. June 22, 1860, 12 Stat. 83, Rev. Stat. sec. 5270-5280.

²⁶A number of extradition treaties were concluded before the first statute in 1848, and extraditions were made under them. See *The British*

that extradition need not be given for offenses not specified in the treaty, but the meaning of the offense named in a treaty will be determined by the law of the country where it was committed.²⁷

(2) Constitutional guarantees require that "due process of law" be given to persons in the territory of the United States before extradition. This necessity is satisfied if evidence sufficient to warrant commitment for trial in the United States²⁸ or to indicate probable guilt²⁹ is forthcoming, even though the party is to be extradited to foreign territory under military occupancy of the United States, where the usual forms of trial guaranteed to inhabitants of the United States may not be had.³⁰ Many countries refuse to extradite their citizens, and a number of treaties to which the United States is a party specifically exempt them, but the United States does not recognize this exemption in the absence of specific treaty provision.³¹

(3) The actual surrender of the accused is an executive act and is performed by the president through the secretary of state, except in certain treaties with Mexico,³² in which the state authorities along the frontier are given power to surrender accused persons within their jurisdiction. The treaties themselves furnish sufficient authority for the exercise of this power,³³ but it can not be exercised until the evidence has been heard and certification given by the proper judicial authority.³⁴ It seems that even after such certification the president's power is not merely administrative. He may in his discretion refuse to surrender a

Prisoners, 1 Wood and M. 66; (U. S. C. C., 1845) U. S. vs. Watts, 14 Fed. Rep. 130; U. S. vs. Rauscher, 119 U. S. 407; Moore's Digest, 4;270-273. U. S. vs. Robbins, Bees Admr. 266; Matter of Metzger, 5 How. 176, (1847). See E. S. Corwin, National Supremacy, N. Y., 1913, p. 277 et. seq.

²⁷This is frequently required by the terms of the treaty. See Benson vs. McMahon, 127 U. S. 457, 466, (1880); In re Farez, 7 Blatch. 345, Moore's Digest, 4;273-278.

²⁸Nelson Att. Gen., 4 op. 201, (1843); Moore's Digest, 4;388-391.

²⁹In re Ezeta, 62 Fed. Rep. 972.

³⁰Act. June 6, 1900, 31 Stat. 656, providing for extradition to territory under military government, and Neeley vs. Henkel, 180 U. S. 109, (1901), upholding the statute, Moore's Digest, 4;287-306.

³¹Neeley vs. Henkel, 180 U. S. 109, (1901); Moore's Digest, 4;287-306.

³²Treaty with Mexico, 1861, art. 2, Malloy, p. 1126.

³³Terlinden vs. Ames, 184 U. S. 270, 289, (1902); Moore's Digest, 4;397-399.

³⁴Cushing, Att. Gen., 6 op. 217, (1853); Nelson, Att. Gen., 4 op. 240, (1843).

person found liable by the courts.³⁵ The ultimate fulfillment of the duty of extradition is therefore a political rather than a legal one according to the law of the United States. Municipal law can not compel the president to deliver criminals, although after action by the courts it is undoubtedly his duty to do so, except in extraordinary cases.

RETURN OF DESERTING SEAMEN

The return of deserting seamen to their vessels is a matter resembling extradition. As in that case, international law imposes no duty in the absence of treaty,³⁶ but the United States has assumed the obligation in a number of treaties,³⁷ and statutes³⁸ have provided that deserting seamen may be seized on application of the consul of a foreign government having an appropriate treaty with the United States, and on proof of desertion be delivered up to the consul. It has been held that seamen consigned to vessels being built for a foreign government and still in dry dock are within the meaning of these treaties and statutes.³⁹

At the present time, international law imposes no duties of vindication on states in time of peace, although it requires them to observe treaties and international conventions, imposing new duties of this character upon them. The rapid multiplication of these treaties in recent times and the almost universal acceptance of the principles of some of them indicate that, in certain fields, cooperation and mutual aid have become recognized as essential to the life of civilized nations, and while states may not yet be under a legal obligation to accede to such treaties or the principles they embody, international comity certainly imposes a moral obligation which cannot be long neglected. The rules of municipal law enforcing these moral obligations of cooperation in humanitarian and industrial matters and mutual aid in the suppression of crime are therefore closely related in international importance to like measures enforcing positive legal obligations of international law. The accession to treaties of this kind is a purely political matter and beyond the control of municipal law, but the usual measures for enforcing treaties in the United States apply when once they are concluded.

³⁵See Moore's Digest, 4:399-400.

³⁶Tucker vs. Alexandroff, 183 U. S. 424, 431, 467-469; Cushing Att. Gen. 6 op. 148, 209; Moore on Extradition, sec. 408; Moore's Digest, 4:417-420.

³⁷This provision has been contained in fifty-two treaties with thirty-five countries.

³⁸Rev. Stat., 5280; on procedure, see Rev. Stat. sec. 4079-4081.

³⁹Tucker vs. Alexandroff, 183 U. S. 424.

CHAPTER VI. OBLIGATIONS OF REPARATION

INTRODUCTORY

Reparation is a duty owed by a state in case of a failure to observe any of its obligations under international law. If it commits any forbidden acts itself, or fails to prevent its subjects from doing so, it must make amends to the injured state or its subjects. This applies to violations of the duties of states when neutral or belligerent, as well as in time of peace. To enumerate the occasions on which reparation is due would, therefore, be to recapitulate practically the whole of this paper. It is not the purpose of this chapter to discuss the occasions upon which the United States has given reparation, but rather to consider the general laws by which the duty to make reparation is enforced.

Like all obligations of international law, reparation is primarily a duty of states. No matter who the perpetrator of the wrong, whether a private person or a diplomatic officer, if it is a breach of international law the state will be held liable. Viewed from this standpoint, reparation is beyond the control of municipal law. As an obligation upon the sovereign power, municipal law can lend no effective sanction, although it can, by proper constitutional agreements, insure a distinct recognition, both national and international, of the authority which is to be considered the responsible agent of sovereignty in this respect, and can furnish a machinery whereby the demands required by a just observance of the duty of reparation may be made known.

Furthermore, although the state is ultimately held responsible, material reparation may often be had more expeditiously by direct recourse to the private person, officer or department of government immediately at fault. Municipal law may enforce the duty of such persons and departments to make reparation.

It is true that the municipal enforcement of the duty to make indemnity incumbent upon the immediate perpetrators of the wrong is often used as a basis for denying the duty of "reparation" altogether, using the term to signify solely an indemnification by the government of the state at fault.¹ This view is be-

¹See especially Secretary of State Evarts and Secretary of State Bayard, official correspondence on Chinese outrages, 1880-1885, Moore's Digest, 6:820-835.

lieved to be untenable. If a breach of international law has been committed, the state through its recognized government is responsible, no matter what advantages of recourse to the immediate party at fault its municipal law may give. The duty of the government to make reparation can only be escaped by proof that the tort was not one of international law. If it is admitted that international law requires a state to give reasonable protection to aliens in its territory, then an injury to such aliens by mob violence implies an obligation of reparation and indemnity by the government, no matter what remedies from the immediate perpetrators, through courts of justice, municipal law may permit. Escape from the obligation of the government can only be based on a denial of the statement that international law imposes such an obligation of prevention.

But although the state can not escape the obligation to make reparation for breaches of international law, through its government, this does not prevent it providing other means by which the injured party may obtain reparation, through municipal law. Such municipal remedies may be more rapid and satisfactory to all parties concerned than recourse to the government through diplomatic channels. If satisfaction is obtained from the person or officer guilty the state's duty of reparation is fulfilled, and to its fulfillment in this manner municipal law may lend a sanction. The question may therefore be treated under two heads, (1) reparation by the national government, (2) reparation by inferior governmental divisions, public officers and private persons.

REPARATION BY THE NATIONAL GOVERNMENT

Under the constitution, exclusive control of foreign relations is in the hands of the national government of the United States. In this field it is sovereign. The municipal law of the United States can not compel it to observe its duties of reparation. On numerous occasions the duty has been recognized, through the voting of indemnities by congress, the authorization of salutes to a foreign flag or public apology, but it has been done as a matter of policy, comity, foreign pressure or sense of international obligation, not from any coercion of municipal law.

Although the duty of the national government to make reparation can not be compelled by municipal law, the probability of the duty being performed will be greatly increased if municipal law (1) places no obstacles in the way of such performance, and (2) establishes a machinery for the determination and set-

tlement of claims for reparation. Municipal law may thus be of great importance in the fulfillment of this international duty.

(1) The obstacles if any which the constitutional system of the United States places in the way of an adequate performance of the duties of reparation will be considered according to the character of those duties. Reparation may take the form of (a) apology, or salute of a foreign flag, (b) cession of territory, (c) pecuniary indemnity, (d) punishment or surrender of offenders, or (e) release of persons held in custody in contravention of international law.

(a) Such formal modes of reparation as apology and salute of the flag are entirely executive in nature. The president through his control of foreign relations exercises unrestrained discretion in these matters.²

(b) Reparation by cession of territory generally results from war. The United States demanded such indemnity, although it can scarcely be called reparation, in the Mexican and Spanish wars, but it has never made cessions for this reason itself. The power to cede territory is generally agreed to be inherent in the treaty power, consequently, if necessary, reparation of this character could be made by the president with the advice and consent of two-thirds of the senate.³

(c) Pecuniary indemnity is the most common form of reparation, and it clearly cannot be made without the express consent of congress. Congress by the constitution has control of the purse, and consequently no indemnity can be paid without an appropriation by it, although lump appropriations for the general purpose of settling claims might be voted, to be expended at

²For reparation by apology see The Trent Affair. No formal apology was made, but Great Britain recognized the return of Mason and Slidell and Secretary of State Seward's note as equivalent to the apology demanded. Moore's Digest, 7;771. For reparation by salute of flag see case of French Consul subpoenaed in San Francisco, Moore's Digest, 5;80; case of The Florida seized in Brazilian territorial waters, Moore's Digest, 7;1091; Case of Spanish consulate attacked at New Orleans, Moore's Digest, 6;813.

³Lattimer vs. Poteet, 14 Pet. 14. There has been dicta to the effect that the consent of a state is necessary before any of its territory may be ceded. See Geofroy vs. Riggs, 133 U. S. 267; Insular cases, 182 U. S. 345, though in this case the court admitted that territory of a state might be ceded to buy peace after a disastrous war without such consent. See Butler, Treaty Making Power, 1;411-413; 2;238, 287-294; Moore's Digest, 5;171-175.

executive discretion. As the steps leading to reparation and the correspondence on the subject are conducted by the president, a failure on the part of congress to appropriate for a reparation the validity of which had been admitted by the executive, might lead to serious trouble. As a matter of fact congress appears to have followed the recommendations of the president in this respect.⁴

However, the probability of the national government paying indemnities depends somewhat upon its control of the actual perpetrators of the wrong. The breach of international law may have been through an act of the national government itself or an agent acting under express authority, in which case no such question would arise. It may have been through the unauthorized act of an officer of the national government abroad or within the territory of the United States. As such officers if military or naval are under the constant control of the government through courts martial and military law and if civil are under executive control and are frequently bonded, the government would have no grounds for denying its responsibility from this cause.

Where the offense has been committed by a state officer or a private citizen within the territory of a state, it seems to be settled that the constitution does not bar the national government from prosecuting the offender in its own courts if his act violates international law or a treaty.⁵ It is also clear that no such jurisdiction may be exercised unless statutes specifically provide for it.⁶ Statutes have provided for the extension of the jurisdic-

⁴As examples of pecuniary indemnity voted by congress, see Case of Spanish Consul, Act, Aug. 31, 1852, 10 Stat. 898; Mch. 3, 1853, 10 Stat. 262, Moore's Digest, 6:814-818; Rock Springs Anti Chinese Outrage, Oct. 19, 1888, 25 Stat. 565,566; Italian Lynchings, New Orleans, 1891, Moore's Digest, 6:840; Colorado, June 8, 1896, Moore's Digest, 841; Hahnville, La., July 19, 1897, 30 Stat. 105,106; Tallulah, La., 1899, Moore's Digest, 6:846; Erwin, Mass., Mch. 3, 1903, 33 Stat. 1032; English Seaman injured, New Orleans, June 8, 1896; Mexican Lynching, Yreka, Cal., July 17, 1898, 30 Stat. 653; in Texas, March 3, 1901, 31 Stat. 1010.

⁵W. W. Willoughby, *The Am. Const. System*, N. Y., 1904, p. 108; E. S. Corwin, *National Supremacy*, N. Y., 1913; *U. S. vs. Arjona*, 120 U. S., 479, (1887).

⁶On the strictly statutory character of the jurisdiction of federal courts except the supreme court see *U. S. vs. Worrall*, 2 Dall. 384, (1798), and general terms of judiciary act of 1789, Rev. Stat. 687-750 granting less jurisdiction than is included under constitutional provisions. Somewhat contra see *In re Debs*, 158 U. S. 564, 584, saying, "Every government is en-

tion of federal courts over persons violating diplomatic immunities, and over a few specified offenses against foreign states,⁷ but no such provision has been made where the offense is against the general rights of aliens or consuls residing within the country. It is not surprising, therefore, that for offenses of this character the United States has been very reluctant to admit a duty of reparation. Where it can not punish offenders, or take measures to prevent a recurrence of outrages, the national government has felt that it is not legally responsible, and where it has made indemnity has done so as a "gratuity" rather than an obligation.⁸ If, however, as appears to be the case, international law imposes a duty of preventing injury to resident aliens, no such plea will avail. The United States government is the only authority within the territory of the United States known to foreign states, and will be held responsible for violations of international law or treaties, whether it in fact can control the guilty persons or not. It therefore seems that statutes should give the federal courts jurisdiction over offenders of this character.⁹

(d) Frequently the injured state has specifically demanded the punishment of offenders as reparation.¹⁰ Here also the con-

trusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, and has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other." The supreme court appears to have an inherent jurisdiction by the constitution subject to the power of congress to limit it, but as positive grants of jurisdiction by congress are held to negative all other jurisdiction, its jurisdiction in reality extends no further than provided by statute. See *U. S. vs. Moore*, 3 Cranch 159, 170, 172; *Durousseau vs. U. S.* 6 Cranch 307, 313; *Ex Parte McCardle*, 7 Wall. 506, 513.

⁷*Supra*, p. 71 et seq.

⁸See Diplomatic correspondence and congressional action on indemnities for injury to Spanish consul, 1851, Chinese Outrages, 1880-1885, Italian Lynchings, 1891-1901, etc., *Moore's Digest*, 6; 811-849. In the last of the Italian cases the act of congress Mch. 3, 1903, 33 Stat. 1032, appropriated \$5,000 "out of humane considerations without reference to the question of liability therefor to the Italian Government." *Moore's Digest*, 6; 849.

⁹See Messages Pres. Harrison, Dec. 9, 1891; Pres. McKinley, Dec. 5, 1899, Dec. 3, 1900, *Moore's Digest*, 6; 840, 846-847, in which such legislation is recommended.

¹⁰See case of French Privateers, 1811, *Moore's Digest*, 6; 809; Chinese Outrages, Denver, Colo., 1880, *Moore's Digest* 6; 820; Italian Lynching, New Orleans, 1891, *Moore's Digest*, 6; 838.

stitutional division of power between state and national governments has offered an obstacle to the performance of this demand. In the case of army and naval officers¹¹ and civil officers of the United States government, misconduct in office is made a crime against the United States, and offences by such officers are cognizable by federal courts. The same is true of persons guilty of violating the immunities of foreign diplomatic officers, or the obligations of neutrality, and a few other acts forbidden by international law, such as counterfeiting foreign securities. No statutes have, however, given the federal courts criminal jurisdiction of persons violating rights of aliens guaranteed by treaty or international law, and consequently unless the state government, which cannot feel the pressure of international responsibility, chooses to prosecute such offenders,¹² the duty will not be performed. The constitution undoubtedly permits such an extension of federal jurisdiction, and it would seem that the adequate enforcement of international obligations demands it.

In the place of punishment of offenders against international rights, states have sometimes demanded as a reparation that they be delivered up for punishment by its own tribunals. This was demanded by the Russian Czar upon the arrest of his ambassador in London in 1708,¹³ and by the King of France upon the assault of his secretary of legation at Philadelphia in 1784.¹⁴ The demand was refused in both of these cases and it seems that no such obligation of reparation exists under international law. A state may extradite fugitives from justice in its territory for offenses committed abroad,¹⁵ but the theory of territorial sovereignty upon which international law is so largely based places it under no obligation to surrender persons for acts committed

¹¹On court martial punishment of the commander of the United States vessel *Wachusett*, in reparation for the seizure of the confederate cruiser *Florida* in Brazilian territorial waters, see Moore's Digest, 7;1090.

¹²The Continental Congress recommended that the states prosecute offenses against the Law of Nations, (Res. Nov. 23, 1781, Journ. Cong., 7;181, Ford ed., 21;1137) and offered to pay for the prosecution of such offenses, (Res. Aug. 2, 1779, *Ibid.*, 5;232, Ford ed., 14;914).

¹³See statement of this case in *Triquet vs. Bath*, 3 Burr, 1478, (K. B. 1764), Scott, 6., Holland, studies in international law, p. 187.

¹⁴*Res Publica vs. De Longchamps*, 1 Dall. 111, (Pa. 1784).

¹⁵In countries which adhere to the theory of jurisdiction by nationality even extradition for offenses committed abroad is refused in the case of their own subjects. See Italian refusal to extradite its subjects even when no exemption was specified in treaty. Moore's Digest, 4;290-297. In this case Italy punished the persons whose extradition was asked.

within its own jurisdiction. To do so would be to acknowledge an extra-territorial effect of the laws of the foreign country. International law may require a state to punish offenders as a reparation for international wrongs, but it does not require it to submit them to the punishment of the injured state.

(e) On several occasions the release of officers or persons held under public authority has been the form of reparation demanded. Where the person is held by the executive or judicial authority of the national government, that authority can grant release, in the former case by executive action as in the Trent affair of 1861;¹⁶ in the latter by writ of habeas corpus which may be instituted by executive authority, or by a direct statutory prohibition of jurisdiction as in the case of foreign diplomatic officers.¹⁷

Where the person is held by authority of a state court, again an obstacle may be presented to the effective fulfilling of international duty, as was illustrated in the case of McLeod,¹⁸ an English soldier, held by authority of the state of New York for an alleged murder, and whose release was demanded by Great Britain. In this case the national government was unable to effect a release, and as a consequence a statute¹⁹ was soon after passed providing that persons held by state authority whose release was demanded on grounds of international law might be brought before the federal courts on habeas corpus, in which case the national authorities might upon satisfactory evidence bring about a release. The statutory provisions excluding cases against diplomatic agents from the jurisdiction of state courts altogether, remove this obstacle from the release of such persons by national authority.

It seems that the constitution offers no obstacle to the observance of all national duties of reparation. The principle of national supremacy in the fields constitutionally delegated to the national government, including foreign relations, permits of legislation by congress and the exercise of jurisdiction by federal courts, "necessary and proper" to fulfill all duties required by international law or treaty.²⁰ However, additional legislation to

¹⁶On release of Mason and Slidell as a reparation for their illegal seizure from the British vessel Trent, see Moore's Digest, 7;768-770.

¹⁷Act, Apr. 30, 1790, 1 Stat. 117, Rev. Stat. sec. 4063-4064.

¹⁸People vs. McLeod, 25 Wend. 483, (N. Y. 1841) in which an application for a writ of habeas corpus was refused by the state court. See Moore's Digest, 2;24-25.

¹⁹Act, Aug. 29, 1842, Rev. Stat. 753, Moore's Digest, 2;30.

²⁰See Pomeroy, J. N., An introduction to the Constitutional law of

make some of this constitutional power effective seems to be necessary.

(2) The fulfillment of the duty of reparation may be secured by the provision of an adequate machinery for prosecuting claims for reparation. The final method for prosecuting any claim for reparation is the resort to force by way of intervention, reprisal or war. Observance of the "duty" of reparation, if it can be called a duty under such coercion, is a matter of policy and certainly requires no additional sanction from municipal law. We have to do solely with the duty of making reparation for acknowledged breaches of international law.

The prosecution of claims for reparation may be by, (a) judicial means provided by municipal law, (b) diplomacy, or (c) arbitration.

(a) By an act of 1855²¹ a court of claims was established, at first as an advisory body, but later²² as a court with power to compel payment of money from general appropriations for that purpose. Aliens are permitted to prosecute suits in the court of claims if their government accords a like privilege to the United States citizens, and most European governments have been included in this class.²³ The jurisdiction of the court extends over claims founded on acts of congress, executive regulations, contracts express or implied with the United States, damage cases not sounding in tort and all claims referred to it by either house

the United States, 9th ed., N. Y., 1886, p. 571 Corwin, E. S., *National Supremacy*, N. Y., 1913, *passim*.

²¹Act, Feb. 24, 1855, 10 Stat. 612.

²²Act, Mch. 3, 1863, 12 Stat. 765. Under this act the court was still simply advisory, as the Secretary of the Treasury had a discretionary power to revise its decision; consequently the supreme court refused the appellate jurisdiction given to it. (*Gordon vs. U. S.*, 2 Wall. 561). This difficulty was remedied by the act of Mch. 17, 1866, see also Tucker act, Mch. 2, 1887, 24 Stat. 505, U. S. Rev. Stat. 1059, 1089, Judicial Code, 1911, 36 Stat. 1087, sec. 142, 180.

²³Act, July 27, 1868, 15 Stat. 243; Rev. Stat. 1068. Judicial Code Privileges accorded subjects of Great Britain, (*U. S. vs. O'Keefe*, 11 Wall. 178; *Carlisle vs. U. S.* 16 Wall. 147) Belgium, (*DeGive vs. U. S.* 7 Ct. Cl. 517); France, (*Rothschild vs. U. S.* 6 Ct. Cl. 204; *Dauphin vs. U. S.* 6 Ct. Cl. 221); Italy, (*Fichera vs. U. S.* 9 Ct. Cl. 254); Prussia, (*Brown vs. U. S.* 5 Ct. Cl. 571); Spain, (*Molina vs. U. S.* 6 Ct. Cl. 571); Switzerland, (*Lobsiger vs. U. S.* 5 Ct. Cl. 687). See Roger Foster, *A Treatise on Federal Practice, Civil and Criminal*, 5th ed., 3 vols., Chicago, 1913, 3:2309.

of congress.²⁴ It is expressly stated, however, that the jurisdiction does not extend to claims "growing out of or dependent upon treaty stipulations entered into with foreign nations or with Indian tribes."²⁵ As the court's jurisdiction is limited to the express terms of statute it does not extend to claims based on general international law. The court therefore could not aid in enforcing the national duty of reparation unless congress had first acted, except in so far as the obligation to pay contract debts may be considered a duty of international law.

(b) Diplomatic representation is the most frequent method of presenting demands for reparation. These must be presented to the Department of State and must come from a foreign government through its diplomatic representative in the United States.²⁶ The Department of State will not listen to a claim presented by a foreign private person and congress will not consider any alien claims not coming through the Department of State.²⁷ The action of the Department of State upon claims is entirely discretionary, and its recommendation to congress although generally followed has no controlling effect. Congress having acted, it would seem that the payment of claims becomes a purely administrative act and the foreign claimant can have recourse to the court of claims on the authority of this statute, or to an action of mandamus to compel payment by the Secretary of the Treasury or the Secretary of State.

(c) The conclusion of arbitration treaties and the determination to submit any particular claim to arbitration are political questions and beyond the power of municipal law to control. The United States has concluded a large number of special as well as general arbitration treaties.²⁸ The former usually specify the procedure to be observed and the subjects to be submitted to the jurisdiction of the arbitral court.²⁹ The latter provides that all

²⁴Act, Feb. 24, 1855, 10 Stat. 612; Rev. Stat. 1059. Judicial Code, Act, Mch. 3, 1911, 36 Stat. 1087, sec. 145, District courts now exercise a concurrent jurisdiction in these matters, *Ibid.*, sec. 24.

²⁵Act, Mch. 3, 1863, 12 Stat. 765, sec. 9, Judicial Code, 1911, 36 Stat. 1087, sec. 153.

²⁶U. S. vs. Diekelman, 92 U. S. 520, Moore's Digest, 6;607-609.

²⁷Magoon's Reports 338; see also 43 Cong., 1st Sess., Report No. 496, committee on war claims, May 2, 1874; Moore's Digest, 6;608.

²⁸Supra, p. 26, note 18.

²⁹It has been held that decisions of an arbitral court beyond its competence as defined by treaty are void. See *Comegys vs. Vasse*, 1 Pet. 193; *Trevall vs. Bache*, 14 Pet. 95; *Judson vs. Corcoran*, 17 How. 612; Moore's Digest, 7;30-33.

questions of a class or all questions except those of a specified class shall be submitted to arbitration, yet although treaties are, by the constitution, the law of the land, cases do not come before arbitral tribunals automatically. The submission of any case is a political question, upon which the executive power of the government has discretion.

A claim having been submitted to arbitration and an award given, the matter is subject to enforcement by municipal law. It has been held that an arbitral decision is final and as binding on the courts as an act of congress.³⁰ It would therefore seem that the payment of the award is purely administrative in character, and can be compelled by mandamus. This however is not true in cases in which the award has been for the United States, and its citizens claim payment. If it develops that fraud was practiced, the United States government can reopen the whole matter and refuse payment to its citizens.³¹ The arbitral decision is *res judicata* as between the governments, but not as between the government and its own subjects.

Although the submission of questions to arbitration even under general treaties is a political question and beyond the control of municipal law, the establishment of a mode of procedure by means of such treaties and of a permanent panel of judges as is provided by the Hague conventions undoubtedly affords an important sanction to the equitable fulfillment of duties of reparation. The establishment of a permanent court of arbitration with recognized jurisdiction, as was attempted and notably favored by the United States' delegation at the second Hague conference, would add an even more effective sanction of similar character.

REPARATION BY INFERIOR GOVERNMENTAL DIVISIONS, PUBLIC OFFICERS, AND PRIVATE PERSONS

As has been stated, the national government of the United States is primarily responsible for all breaches of international law by itself or its citizens and reparation for such torts may always be expected from it. This does not, however, prevent the injured party seeking reparation from inferior governmental organs, officers, or individuals. We may therefore consider the mu-

³⁰Comegys vs. Vasse, 1 Pet. 193, 212. La Ninfa, 75 Fed. Rep. 513, (1896).

³¹Frelinghuysen vs. Key, 110 U. S. 63; Boynton vs. Blaine, 139 U. S. 306; U. S. vs. LaAbra Silver Mining Co., 32 Ct. Cl. 462, (1897); LaAbra Silver Mining Co. vs. U. S., 175 U. S. 423, (1899). See Moore's Digest, 7:65-68.

nicipal measures enforcing the duty of such persons to make reparation.

(1) The constitution permits the extension of the jurisdiction of federal courts to controversies "between a state or the citizens thereof, and foreign states, citizens or subjects,"³² but not to "suits in law or equity commenced or prosecuted against one of the United States * * by citizens or subjects of any foreign state."³³ The exemption does not extend to suits prosecuted by foreign states. It therefore seems that so far as the constitution is concerned, a foreign state could bring action for reparation against one of the commonwealths of the union in the federal courts although its subjects acting individually could not. The statutes, however, have not provided for such a jurisdiction; consequently there have been no such actions. Foreign states have always asserted that the government of the United States is the only authority recognized by them as responsible, and have refused to have direct recourse to state governments, even when the state has offered to make indemnity.³⁴

Some states have established courts of claims in which they may be sued under limitations,³⁵ and a number of them have provided by law for the responsibility of cities and counties for property losses and lynchings.³⁶ These methods of recovery are open

³²Constitution, art. 3, sec. 2, cl. 1.

³³Constitution, Amendment 11.

³⁴See case of French Privateers, 1811, in which the State of Georgia offered to make indemnity for injury to French seamen in Savannah. Moore's Digest, 6;809.

³⁵Illinois Act, Mch. 23, 1819, Laws 1819, p. 184; Act, Jan. 3, 1829, Rev. Laws, 1832, p. 593, repealed Rev. Stat. 1845, p. 464, permitting the auditor of Public Accounts to be sued for the state. Ill. Act, May 29, 1877, laws, 1877, p. 64, creating a commission of claims "to hear and determine all unadjudicated claims of all persons, against the state of Illinois" and submit them to the auditor of public accounts who is to lay them before the general assembly. Ill. Act, May 16, 1903, laws 1903, p. 140, creating a court of claims with a similar authority. See N. Y. Laws, 1870, c. 321; 1876, c.444; 1883, c.205; 1897, c.36; Mass. Rev. Laws, c.201. See Freund, Cases on Administrative Law, St. Paul, 1911, p. 363-367.

³⁶As examples, see Ill. Rev. Stat. 1913, c.38, sec. 256a-256g, p. 854, making a city or county liable for three-fourths damages for property losses caused by a mob of over twelve persons, with the proviso that such liability does not prevent recovery from individual perpetrators; c.28, sec. 256w, p. 857, creating a liability of \$5000 upon counties and cities for lynchings, recoverable by the survivors of the person lynched.

to aliens or foreign sovereigns under the usual provisions opening courts to such persons.

(2) Recourse against private persons or officers of government may be had by either foreign individuals or sovereigns.³⁷ Such suits may also be commenced in the name of a foreign state.³⁸ Foreign states or persons bringing such suits have the advantage of the usual principles of law applicable to suits brought for the recovery of claims or damages by citizens.³⁹ The foreigner in such a case has the additional advantage of an option in bringing his case in either the state or federal courts. By the constitution the jurisdiction of the federal courts may be extended to controversies "between a state or the citizens thereof, and foreign states, citizens or subjects," and statutes have provided for the exercise of this jurisdiction as to such suits against citizens.⁴⁰

The usual principles of liability of officers apply in suits brought by aliens as well as by citizens. In principle Anglo-American law considers officers liable for wrongful acts, in which case they would be liable for torts violating international rights of foreign states or persons.⁴¹ The tendency, however, is to relieve officers from such liability either by statute or judicial deci-

³⁷King of Spain vs. Oliver, 2 Wash. C.C. 429.

³⁸The Saphire, 11 Wall 164 and Moore's Digest, 2;85-87. English cases, U. S. vs. Prioleau, 35 L. J. Ch. N. S. 7, (1865); U. S. vs. McRae, L. R. 8 Eq. 69, (1869); Moore's Digest, 1;65-66.

³⁹Cushing, Att. Gen., 7 op. 229, (1885); Taylor vs. Carpenter, 3 Story 458; State vs. Chue Fan, 42 Fed. Rep. 865; Crashley vs. Press Pub. Co., 179 N. Y. 27, (1904); Moore's Digest, 4;7-9.

⁴⁰Constitution art. 3, sec. 2, cl. 1. United States district courts have jurisdiction of civil suits where the matter of controversy is over \$3,000 "between citizens of a state and foreign states, citizens or subjects," (Judicial Code, 1911, 36 Stat. 1087, sec. 24, cl. 1) and "of all suits brought by any alien for a tort only in violation of the Law of Nations or of a treaty of the United States" (Ibid, sec. 24, cl. 17). All suits of which district courts have original jurisdiction, or in which the parties are of diverse citizenship and there is danger of local prejudice, may be removed from state courts to U. S. district courts by motion of the defendant. (Ibid. sec. 28). Most of these provisions were in the Judiciary act of 1789, Rev. Stat. sec. 563, cl. 16, sec. 629, cl. 1. Removal of cases involving aliens to circuit courts was provided in an act of Aug. 13, 1888, 25 Stat. 434, sec. 2, on which see New Orleans Co. vs. Rabasse, 10 So. 708, Breedlove vs. Nicolet, 7 Pet. 413. The circuit courts were abolished by the judicial code of 1911, sec. 289.

⁴¹Little vs. Barreme, 2 Cranch 170, (1804).

sion when they act in good faith, the state sometimes assuming the liability in such cases. The responsibility of private persons would be governed by the law of torts and contracts of the state where the action was brought, the same remedies generally being open to the alien as to a citizen.⁴²

⁴²See reference to this mode of indemnification in letter of Secretary of State Bayard, For. Rel. 1886, p. 158, in reference to Chinese Outrages at Rock Springs, Wyo., 1885, in which reference is also made to the right of aliens to remove cases to federal courts. Moore's Digest, 6:831-832.

PART II. OBLIGATIONS AS A NEUTRAL TOWARD BELLIGERENTS

CHAPTER VII. INTRODUCTORY

The obligations of neutral states have been classified by Holland¹ as obligations of (1) abstention, (2) acquiescence and (3) prevention. To these Lawrence² adds two, the duties of (4) restoration and (5) reparation.

(1) The obligations of abstention peculiar to neutrality relate to matters which the state itself must abstain from doing, and are outside of the jurisdiction of municipal law. Whether a state by performing its duties of abstention shall remain a neutral, or whether by refusing to perform them it intervenes and thus itself becomes a belligerent is a question which is always to be determined by the political departments of the government. Municipal law can not in any way effect the power of the state thus to exercise its sovereignty. It may be noted that certain acts of abstention are specifically required by one of the Hague conventions of 1907. Thus neutral states are required to abstain from partiality in dealing with belligerents, from supplying belligerent powers with "warships, ammunition, or war material of any kind," and from partiality in applying "conditions, restrictions and prohibitions" upon the admission of belligerent warships or prizes into their territorial waters.³ By the constitution⁴ treaties are declared to be a part of the law of the land; consequently these provisions might be regarded as rules of municipal law. In reality, as they are directory upon the state itself they can not be enforced by any regularly constituted state authority, so scarcely deserve that title. They are rules directory upon the political organs of government, but are not enforceable rules of municipal law. The duties of abstention discussed under the law of peace likewise apply to states in time of neutrality.

¹T. E. Holland, *Neutral Duties in Maritime War*, Proceedings of the British Academy, 2;2, quoted Moore's Digest, 7;863.

²T. J. Lawrence, *The Principles of International Law*, 4th ed., N. Y., 1910, p. 629.

³Hague Conventions, 1907, v, art. 9, xiii, arts. 6, 9.

⁴Constitution, art. vi, sec. 2.

(2) The neutral state's obligations of acquiescence are entirely passive. They require the state to submit without protest to incidental inconveniences and detractions from its ordinary rights under international law caused by the operation of acknowledged privileges of belligerents. The most prominent of these inconveniences is the loss to its subjects which results from the exercise of belligerent rights in interfering with maritime commerce such as the right of visit and search, seizure, and confiscation after adjudication for breach of blockade, contraband trade, unneutral service and similar acts. A neutral state must also acquiesce in occasional losses by its citizens resident in belligerent countries, when such losses are incidental to the conduct of hostilities. The duty of acquiescence simply requires the acknowledgment by the neutral state that the ordinary rights of its citizens under international law are modified in their relations with a belligerent community or state. The form which a breach of this duty would take would be the making of unwarranted diplomatic protests or intervention. As in the case of abstention both of these acts are prerogatives of sovereignty and incapable of limitation by municipal law. The duties of acquiescence connected with exemptions from territorial jurisdiction and servitudes apply to states in neutrality as well as in peace.

(3) The duty of prevention requires a state to prevent unneutral acts by its citizens and agencies of government, and the unneutral use of its territory. It is in this field that municipal law is most essential for the preservation of neutral obligations.

(4) The duty which Lawrence has in mind when he speaks of "restoration" is the duty which a neutral state is under to restore to the original owner⁵ prizes captured in its waters or illegally brought to its ports. It seems that the use of the term restoration as describing this duty is unfortunate as it implies that the duty is one owed to the power to whom the prize is restored. If this were true, if the owner of the vessel captured in violation of neutrality had a right to its restoration, he could make his claim if the vessel were in the custody of a belligerent as well as a neutral prize court. This, however, is not the case. It is a recognized principle that the owner of the vessel can not claim restoration in a belligerent prize court, on the ground that the seizure was in violation of the neutrality of a third state.⁶ The

⁵Lawrence, *op. cit.*, p. 649.

⁶"A capture within neutral waters is, as between enemies, deemed to all intents and purposes rightful; it is only by the neutral sovereign that

prize is restored not as a reparation to the state from which it was taken, but as a vindication of its own neutral rights by the neutral state.⁷ Like international cooperation and the extradition of criminals, it is an obligation growing out of the general interest of humanity which requires the greatest possible restriction of the area of war. Unlike them, however, it is a duty required by international law even in the absence of treaty stipulations, and reparation may be demanded in case of failure to observe it.⁸ We will therefore include the duties which Lawrence discusses as duties of "restoration" in the subject "obligations of vindication." There are other obligations which will logically be included in this subject, such as that to intern belligerent troops entering neutral territory and to enforce observation of the twenty-four hour stay and twenty-four hour interval rules by belligerent vessels taking asylum in its ports.

(5) The duty of reparation refers to the obligation which a neutral state is under to make suitable amends to the injured belligerent for a failure to perform any of its other duties as a neutral. The reparation may assume the forms of payment of damages, restoration of property or public apology. The payment by Great Britain of the *Alabama* claims award in 1871 is a classic

its legal validity can be called in question; and as to him only it is to be considered void." *The Ann*, 3 Wheat. 435, 447, (1818). See also, *The Adela*, 6 Wall. 266, (1867); *The Sir Wm. Peel*, 5 Wall. 535; *The Lilla*, 2 Sprague, 177; *The Florida*, 101 U. S. 37, (1879). English cases, *The Eliza Ann*, 1 Dods. 244, (1813); *The Purissima Conception*, 6 Rob. 45, (1805); *The Diligentia*, 1 Dods. 404, 412, (1814); *The Etrusco*, Lords, 1795, 3 Rob. 31; *The Vrouw Anna Catherina*, 5 Rob. 144. See Scott, Cases, pp. 684-691; Moore's Digest, 6;1000, 7;511,1089.

⁷If the property has been captured within the jurisdiction of the neutral, the neutral "may indeed inflict pecuniary or other penalties on the parties for such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured." *La Amistad de Rues*, 5 Wheat. 385. See also *La Estrella*, 4 Wheat. 298, (1819); *The Santissima Trinidad*, 7 Wheat. 283,496. Fenwick, op. cit. p. 90, says: "Where vessels have been fitted out and armed or have increased their force, in violation of the neutrality of the United States, the courts of the United States will intervene to effect a restitution of prizes captured by such vessels, not because the capture is illegal as between the captor and the former owner, but because the neutral state has the right to vindicate its own sovereignty by divesting possession of property acquired as the result of a violation of its sovereignty."

⁸*Commodore Stewart's Case*, 1 Ct. Cl. 113, (1864), Scott, 910. *Infra* p. 134, note 25.

example of the performance of this duty. There are no duties of reparation peculiar to the law of neutrality. The provisions of United States law enforcing this duty in time of peace apply equally well to the enforcement of obligations arising in time of neutrality.

We will then consider the municipal measures enforcing the obligations of the United States as a neutral under two heads, (1) the obligations of prevention, and (2) the obligations of vindication.

It is probably desirable to present in more detail the basis of distinction between these two classes of duties. The duty of prevention differs from the duty of vindication in that the former relates to certain obligations a neutral state is under in reference to its own subjects and territory, while the latter is concerned with the treatment of foreign subjects and agencies of government. International law does not define the means which a state must take in performing its duties of prevention. It is of no international importance whether it chooses to control its subjects and the use of its territory by means of criminal penalties, requirements of bonds or other guarantees, or the use of military force; so long as it exercises "due diligence" or "the means at its disposal," the methods are entirely a matter of internal policy. On the other hand, in performing the duty of vindication the state is dealing with persons who are not its own subjects. It is really acting as an agent of the society of nations to adjudicate a breach of international law. Consequently that society is interested in the method of treating these violators of international duty, and specifies in international law that illegal prizes shall be restored, belligerent troops shall be interned, vessels illegally in ports shall be expelled or sequestered, etc.

In general, therefore, the municipal rules enforcing duties of prevention consist of rules supplementary to international law, while those enforcing duties of vindication consist of rules of international law which are also rules of municipal law.

It may be added that the same act may entail obligations of both kinds. A neutral state may be required to prevent a specified infraction of its neutrality. If it is unsuccessful in preventing this act, it may be required to vindicate its neutrality in a particular manner. Thus a neutral state is under an obligation to prevent hostilities in its territorial waters. Yet if a prize is there taken in spite of its efforts, the duty of vindication requires it to adjudicate this prize and restore it to its situation before capture.

CHAPTER VIII. OBLIGATIONS OF PREVENTION.

TREATY PROVISIONS

(1) The United States has recognized certain duties of prevention as incumbent upon it by treaty. Many of the early treaties of the United States contain an article stipulating for the preservation of "perpetual peace and amity" between the two parties.¹ In *Henfield's case*,² which arose in 1793, such provisions in the treaties with Netherlands³, Prussia⁴, and Great Britain⁵ were made one of the bases for the government prosecution of a person accused of accepting a commission from France who was at war with these countries. General principles of international law were also relied on in the case, but the main support for the indictment seemed to be that *Henfield's* acts were prohibited by these treaties, which were law in the United States. Though the court accepted this view at that time, it is clear that criminal indictments could no longer be supported under such general treaty provisions⁶, and as a matter of fact few treaties now in force contain the perpetual peace and amity clause in the mandatory form it assumed in the early treaties.

By another common provision in early treaties the contracting parties bound themselves when neutral to prevent their

¹As an example of this kind of treaty may be mentioned that with France, in force from 1778 to 1798, which said, "There shall be a firm, inviolable, and universal peace and a true and sincere friendship between" etc., Malloy, p. 469. The same phrase introduces the treaty with Sweden of 1783, p. 1725; with Prussia, 1785-1796, p. 1477; with the Netherlands, 1782-1795, p. 1234; with Great Britain, 1794, p. 591. Most of these treaties have been abrogated or superseded and the more recent treaties generally relate to particular subjects such as commerce, extradition, consular privileges, etc., and do not contain the specific peace and amity clause. This, however, is not universally true. The treaty with Spain of 1902 begins with an article of the character formerly so common, p. 1701.

²In *re Henfield*, Fed. Cas. 6360, (1793).

³Treaty with the Netherlands, 1792-1795, art. 1, Malloy, p. 1234.

⁴Treaty with Prussia, 1785-1796, art. 1, Malloy, p. 1477.

⁵Treaty with Great Britain, 1794-1807, art. 1, Malloy, p. 591.

⁶*U. S. vs. Worral*, 2 Dall. 384, (1798); *U. S. vs. Hudson*, 7 Cranch 32, (1812).

subjects from accepting privateering commissions or letters of marque to serve against the other.⁷ Often the stipulation was added that offenders were to be punished as pirates.⁸ Such provisions were frequently mentioned by the courts as the basis for assuming jurisdiction over prizes brought into United States ports, and for restoring them to their original owners when it was proved that the captor was an American citizen operating under a foreign letter of marque.⁹ No criminal prosecutions have, however, been instituted under strength of the treaty provisions alone, although there would seem to be greater warrant for such action than under the general peace and amity provisions invoked in the *Henfield* case. On the contrary, the court in *The Bello Corrunes*, commenting on the fact that the acceptor of a certain commission to cruise against Spain ought to be indictable as a pirate according to the treaty with that country, expressed the opinion that under the "free institutions of this country" such action would probably be impossible.¹⁰ The fact that this duty was undertaken as a privilege, accorded to the contracting party, indicates that it was not regarded as a duty demanded by international law. Privateering itself is now prohibited by international law and states are therefore under the general obligation to prevent the acceptance of letters of marque by their subjects. The matter is

⁷The acceptance of letters of marque to serve against the contracting party is forbidden in the following treaties: France, 1778-1798, art. 21, Malloy, p. 475; Bolivia, 1858, art. 25, p. 121; Central America, 1825-1839, art. 24, p. 167; Chili, 1832-1850, art. 22, p. 178; Colombia, 1824-1836, art. 22, p. 299, 1846, art. 26, p. 310; Dominican Republic, 1867-1898, art. 25, p. 411; Ecuador, 1879-1892, art. 25, p. 428; Guatemala, 1849-1874, art. 24, p. 868; Hayti, 1864-1905, art. 31, p. 929; Netherlands, 1782-1795, art. 19, p. 1239; Peru, 1870-1886, art. 28, p. 423; 1887-1899, art. 26, p. 1439; Prussia, 1785-1796, art. 20, p. 1483; 1799-1810, art. 20, p. 1493; 1828, art. 12, p. 1499; Salvador, 1850-1870, art. 26, p. 1545; 1870-1893, art. 26, p. 1559; Spain, 1795-1902, art. 14, p. 1645; Sweden, 1783, art. 23, p. 1733, renewed, 1827, art. 17, p. 1754; Venezuela, 1860-1870, art. 25, p. 1853; Great Britain, 1794-1807, art. 21, p. 603.

⁸It is provided that offenders shall be treated as pirates in the following of the above treaties: Colombia, Ecuador, Guatemala, Netherlands, Peru, Prussia, Salvador, Spain, Sweden, Great Britain.

⁹*Talbot vs. Jansen*, 3 Dall. 133; *The Bello Corrunes*, 6 Wheat. 152, (1821).

¹⁰*The Bello Corrunes*, 6 Wheat. 152, (1821); Treaty with Spain, 1795-1902, art. 14, Malloy, p. 1645.

mentioned in few if any particular treaties in force, but is considered in general law-making treaties and in statutes.

Article 22 of the treaty with France, of 1778, made it unlawful for foreign privateers other than those of France "to fit their ships" in the ports of the United States, or to sell or exchange prizes which they had captured or to purchase provisions in excess of an amount necessary to supply them to the nearest home port. Since an implied exception was made in the case of France¹¹ it seems that the duties here mentioned were not at that day conceived of as duties imposed by international law. Similar provision, without the exception for the benefit of the contracting parties, has been inserted in a number of other treaties.¹² The special privilege accorded to France in this respect was the basis of much diplomatic difficulty in the early days of the United States, and it was finally abrogated in 1798¹³ by act of congress. It is now clear that the duty to prevent the fitting out of armed vessels is required by international law, and no nation can be accorded special privileges in this regard compatibly with the continued maintenance of neutrality. The United States recognized this fact in the treaty of Washington with Great Britain in 1871.¹⁴ Article six of that treaty stated that a neutral government is bound to exercise "due diligence" to prevent (1) the fitting out within its jurisdiction of vessels intended to cruise against foreign states and the departure of such vessels, and (2) the use of its ports or waters as a "base of naval operations" for the augmentation of military supplies or for the recruitment of men. Although this treaty was concluded with the immediate purpose of furnishing a basis for adjudicating the so called Alabama claims, both countries expressly declared their intention to be bound for the future by these provisions. The treaty is still in force and is law in the United States.

¹¹Treaty with France, 1778-1798, art. 17, 18, Malloy, p. 475.

¹²The selling of prizes, fitting out of privateers, and purchasing of victuals by warships except sufficient to reach the nearest home port is prohibited to enemies of the contracting party in the following treaties: France, 1778-1798, art. 22, Malloy, p. 475; 1800-1809, art. 25, p. 504; Dominican Republic, 1867-1898, art. 24, p. 411; Hayti, 1864-1905, art. 31, p. 929; Venezuela, 1860-1870, art. 24, p. 1853; Great Britain, 1794-1807, art. 24, p. 604.

¹³Act of July 7, 1798, 1 stat. 578.

¹⁴Treaty of Washington, with Great Britain, 1871, Malloy, p. 703.

(2) The greater part of these duties formerly stipulated for in treaties with single countries have now been incorporated in the Hague conventions and thus given more definite recognition as principles of international law. Those dealing with neutral duties are, however, by their terms binding only when all of the parties in the war are signatories.¹⁵ These conventions require a neutral state to prevent, by the use of force if necessary, the transportation of troops across its territory, or the use of neutral territory for erecting wireless stations or for recruiting,¹⁶ but it is stipulated that no obligation exists to prevent individuals crossing its frontiers for foreign service, or the exportation of arms by private persons.¹⁷ In reference to naval war, the neutral must use the "means at its disposal" to prevent the making of captures in territorial waters, the setting up of belligerent prize courts in its territory, or the use of its ports as a "base of naval operations."¹⁸ The principle of the treaty of Washington, requiring the neutral state to prevent the fitting out or departure of armed vessels from its shores, is embodied practically verbatim.¹⁹ The neutral state is also required to prevent belligerent war vessels and prizes, enjoying the right of asylum in its ports, from exceeding the privileges accorded them by international law. Thus it must enforce the twenty-four hour stay and twenty-four hour interval rules and must prevent the carrying out of repairs by war vessels other than those "absolutely necessary to render them seaworthy," and the augmentation of their fighting force or armament. Fuel may only be given sufficient to reach the nearest home port and only once in three months in the same port to vessels of the same belligerent power.²⁰ Failure to enforce these rules would constitute the neutral port a "base of naval operations."

As treaties are declared by the constitution to be part of the law of the land, it would seem that executive officers and courts are justified in assuming authority to carry out any of these provisions, even in the absence of express statutory authority. This view was upheld in the case of *Ex parte Toscana*.²¹ This case does not relate to a duty of prevention, but to the provision of

¹⁵Hague Conventions, 1907, v, art. 20; xiii, art 28, Malloy, pp. 2290-2352.

¹⁶*Ibid.*, v, arts. 2-5, 10; xiii, art. 5.

¹⁷*Ibid.*, v, arts. 6-8, xiii, art. 7.

¹⁸Hague Conventions, 1907, xiii, arts. 2, 4, 5, 25, 26.

¹⁹*Ibid.*, xiii, art. 8.

²⁰*Ibid.*, xiii, arts. 13, 14, 16-21.

²¹*Ex parte Toscana*, 208 Fed. Rep. 938, (1913).

the Hague convention of 1907 requiring a neutral state to vindicate its sovereignty by internment of belligerent troops crossing its frontier. It would seem that if executive officers have power to perform that duty under authority of the treaty alone, a similar exercise of authority in performing duties of prevention would be upheld. Undoubtedly criminal prosecutions could not be undertaken solely under authority of the conventions,²² but it is believed that this case is authority for the view that executive action temporarily restraining property or persons, for the purpose of carrying out any of the duties of prevention required by treaty, would be upheld as valid and not in conflict with constitutional guarantees of "due process of law," etc.

There are, however, statutory means provided for the more effective enforcement of most of the duties of prevention defined in these treaties, as well as those required by the general principles of international law not specified in treaties or international agreements.

STATUTORY PROVISIONS

(1) In 1794 the first neutrality statute was enacted.²³ It defined certain actions on the part of citizens of the United States in aid of one of the belligerents as subject to criminal punishment, and gave administrative authority for the enforcement of these provisions.

The enactment of this statute was the outgrowth of two events, (1) the neutrality proclamation of the president and (2) the unsuccessful attempt to obtain a criminal conviction for a breach of neutrality under treaties, these proclamations and the common law. Washington's neutrality proclamation of April 22, 1793,²⁴ after reciting the state of war which existed and the intention of the United States to remain neutral, said, "I have

²²On lack of a common law criminal jurisdiction in federal courts see *U. S. vs. Worral*, 2 Dall. 384, (1798), *U. S. vs. Hudson*, 7 Cranch 32, (1812). A federal criminal jurisdiction based on treaties and international law was upheld in *In re Henfield*, Fed. Cas. 6360 (1793) and *U. S. vs. Ravara*, 2 Dall. 297, Fed. Cas. 16,122, (1793).

²³Act June 5, 1794, 1 stat. 381.

²⁴Proclamation, April 22, 1793, 11 stat. 753; *Am. St. Pap., For. Rel.*, 1:140; *Compilation of the Messages and Papers of the Presidents, 1789-1897*, J. D. Richardson, ed., 10 vol., Washington, 1896-1899, 1:157. See also Rules adopted by the cabinet as to the equipment of vessels in the ports of the United States by belligerent powers, Aug. 3, 1793, Richardson's Messages, 10:86.

given instructions to those officers to whom it belongs to cause prosecution to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war or any of them." This proclamation was followed by a more vigorous one of March 24, 1793,²⁵ which specified various offences against neutrality which would be regarded as criminal, and especially "required all courts, magistrates and other officers * * to exert the power in them severally vested to prevent and suppress such unlawful assemblages and proceedings and to bring to condign punishment those who may have been guilty thereof."

The contents of these proclamations indicate the belief that breaches of neutrality by individuals could be punished without specific statute, and this view was upheld by the court in the case of *Gideon Henfield*. *Henfield*, who was accused of serving on board a French vessel, was brought to trial in the summer of 1793 after Washington's first proclamation and before his second. The United States Circuit court of Pennsylvania, composed of Justices Wilson, Iredell, and Peters, charged the jury to find *Henfield* guilty of breaches of neutrality because he had violated the law of nations which was part of the common law, be-

²⁵Proclamation, March 24, 1794, 11 stat. 753; Richardson's Messages, 1:157. Neutrality proclamations of similar character have been issued by the president in succeeding wars in which the United States has been neutral. Franco-Prussian War, (Aug. 22, Nov. 8, 1870, 16 stat. 1132; Richardson's Messages, 7: 86; 89): Russo-Japanese War, (Feb. 11, 1904, 33 stat. 2332): Turco-Italian War, (Oct. 24, 1911, 37 stat. 1719): Great War, (Aug. 4-27, 1914, Supp. Am. Jour. Int. Law, 9:1 Jan. 1915). On a number of occasions neutrality proclamations have been issued calling attention to a state of insurrection or insurgency, when belligerency has not been recognized, and to the provisions of the neutrality laws applicable in such circumstances. Revolt of Spanish colonies, (Nov. 27, 1806; Sept. 1, 1815, Richardson's Messages, 1:404, 561): Canadian Insurrection, (Jan. 5; Nov. 21, 1838; Sept. 25, 1841, 11 stat. 784-786; Richardson's Messages, 3:481-482, 4:72): Cuban Filibusters, (Aug. 11, 1849; April 25, 1851; May 31, 1855, 11 stat. 787; Richardson's Messages, 5:7, 111, 272): Mexican Filibusters, (Oct. 22, 1851; Jan. 18, 1854, Richardson's Messages, 5:112, 271): Nicaraguan Filibusters, (Dec. 8, 1855; Oct. 30, 1858, 11 stat. 789, 798; Richardson's Messages, 5:388, 496): Fenian Invasion of Canada, (June 6, 1866; May 24, 1870, 14 stat. 813; 16 stat. 1132; Richardson's Messages, 6:433; 7:85): Cuban Revolution, (Oct. 12, 1870; June 12, 1895; July 27, 1896, 16 stat. 1136; 29 stat. 870, 881; Richardson's Messages, 7:91, 9:591, 694): Insurgency in Dominican Republic, (Oct. 14, 1905, 34 stat. 3183): Mexican Revolution, (Mch. 2, 12, 1912, 37 stat. 1732-1733).

cause he had violated certain treaties of peace and amity between the United States and some of the belligerent powers, and because he had endangered the safety and security of the United States. In spite of this the jury refused to find Henfield guilty largely on account of the popular republican sympathy for revolutionary France.

In order to prevent the recurrence of such an event the president urged upon congress the passage of a neutrality act specifying crimes against neutrality and fixing adequate penalties. The result was the act of June 5, 1794,²⁶ already mentioned. Since that time neutrality acts of similar character have been constantly in force in the United States.²⁷

For some time after the passage of this act there was doubt whether such offenses were not indictable at common law, in the federal courts, in the absence of a specific act. It was only gradually that the doctrine that federal courts enjoy no common law jurisdiction, developed. In the case of the United States vs. Ravara,²⁸ which involved the sending of threatening letters to a diplomatic minister, the United States Circuit court of Pennsylvania maintained its jurisdiction in a criminal case at common law. In the cases of the United States vs. Worrall²⁹ in 1798 and United States vs. Hudson³⁰ in 1812, the latter in the supreme court of the United States, the theory of a common law jurisdiction in federal courts was denied and since then this view has in the main been adhered to. It thus appears that in the present state of the law, in the absence of statute, offenses against neutrality would not be criminally punishable.

²⁶Act June 5, 1794, 1 stat. 381.

²⁷The act of June 5, 1794, (1 stat. 381) was to last two years. It was renewed Mch. 2, 1797, (1 stat. 497), amended, June 14, 1797, (1 stat. 520) and made permanent April 24, 1800, (2 stat. 54). This was amended by the temporary act of Mch. 3, 1817 (3 stat. 370) and the whole statute was revised in the permanent act of April 20, 1818, (3 stat. 447). A temporary amendment was passed March 10, 1838, (5 stat. 212). The act of 1818 was repeated in the Revised Statutes of 1878 (sec. 5281-5291) and with a few alterations in the Penal Code of 1910, (35 stat. 1088, sec. 9-18, 303). Acts of April 22, 1898, (30 stat. 739), March 14, 1912, (37 stat. 630) and March 4, 1915, should be regarded as amendments to the neutrality statutes. For excellent discussion of the neutrality laws, giving the authoritative interpretation by the courts, see C. G. Fenwick, *The Neutrality Laws of the United States*, Washington, 1913, *passim*.

²⁸U. S. vs. Ravara, 2 Dall. 297, Fed. Cas. 16,122, (1793).

²⁹U. S. vs. Worrall, 2 Dall. 384, (1798).

³⁰U. S. vs. Hudson, 7 Cranch 32, (1812).

(2) The crimes defined by the neutrality statutes may be roughly classified as (a) accepting commissions, (b) enlisting in the service of a belligerent, (c) setting on foot military or naval expeditions, and (d) using the territory of the United States as a base of military or naval operations.

(a) "Accepting and exercising" a commission within the United States for service against a foreign state is a crime when performed by United States citizens.³¹ There has been only one prosecution under this provision, that of Isaac Williams in 1797.³²

(b) Enlisting in the service of a foreign state or political body within the territory of the United States, or "hiring or retaining" others to do such an act or to leave the country with "intent" to do so is a crime for either citizens or aliens,³³ but it has been held that the section does not forbid leaving the country with intent to enlist abroad, either individually³⁴ or in parties.³⁵

(c) "Setting on foot military expeditions" within the territory of the United States is made a crime³⁶ and has been held to apply even though the expedition is directed against unrecognized insurgents.³⁷ Hostile "intent" must, however, be proved.³⁸ A mere departure of bodies of men, even with arms, may not constitute a "military expedition" in the meaning of the statute.³⁹ Several sections of the neutrality statutes were designed particularly to prevent the "fitting out and arming"⁴⁰ and

³¹Rev. Stat. sec. 5281, Penal Code of 1910, 35 stat. 1088, sec. 9.

³²U. S. vs. Isaac Williams, 2 Cranch, 82, note., Fed. Cas. 17,708, (1797). See also charge to Grand Jury, McLean, Fed. Cas. 18,265, (1838).

³³Rev. Stat., sec. 5282, Penal Code of 1910, sec. 10.

³⁴U. S. vs. Hertz, Fed. Cas. 15,337, (1855), U. S. vs. Kazinski, Fed. Cas. 15,508, (1855).

³⁵U. S. vs. Nunez, 82 Fed. Rep. 599; U. S. vs. O'Brien, 75 Fed. Rep. 900. On this offense see also Lee, Att. Gen., 1 op. 63; Cushing, Att. Gen., 7 op. 377; In re Henfield, Fed. Cas. 6360, (1793).

³⁶Rev. Stat., sec. 5286, Penal Code of 1910, sec. 13.

³⁷Wiborg vs. U. S., 163 U. S. 632; U. S. vs. O'Sullivan, Fed. Cas. 15,974. Contrary The Three Friends, 166 U. S. 1. See also letter of Secretary of State Bayard, July 31, 1855, For. Rel., 1855, p. 776, and 21 op. 267.

³⁸U. S. vs. O'Sullivan, Fed. Cas. 15,975.

³⁹U. S. vs. Hart, 74 Fed. Rep. 724. Other prosecutions under this section see, U. S. vs. Hart, 78 Fed. Rep. 868; U. S. vs. Lumsden, Fed. Cas. 15,641; U. S. vs. Murphy, 85 Fed. Rep. 609; U. S. vs. Ybanez, 53 Fed. Rep. 536; U. S. vs. Hughes, 75 Fed. Rep. 267. See also Charge to Grand Jury, McLean, Fed. Cas. 18,267, (1851).

⁴⁰Rev. Stat. sec. 5283, 5284, Penal Code of 1910, sec. 11,303.

"augmenting the force"⁴¹ of privateers. These were important in the days of the Napoleonic wars and the revolts of the Spanish and Portuguese colonies in South America in the early nineteenth century, and there were many prosecutions under them.⁴² With the revolution in naval architecture which the use of steel has brought, and the abolition of privateering by the Declaration of Paris of 1856, privateering by individuals is no longer important, although there were prosecutions under these provisions as late as 1891 for fitting out naval expeditions for use in Spanish American revolutions.⁴³ This same change, however, has made the construction and sale of an armed vessel to a belligerent a violation of neutrality in itself.⁴⁴ There have been efforts to apply these provisions to prevent the sale of armed vessels to belligerents. The courts have, however, held that an "intent" to use the vessel in hostilities must be shown, and "intent" implies more than a mere knowledge of the use to which it will be put.⁴⁵ There is no provision making the bona fide sale of ves-

⁴¹Rev. Stat. sec. 5285; Penal Code of 1910, sec. 12.

⁴²Criminal Prosecutions, see, *U. S. vs. Guinet*, 2 Dall. 321, (1795) Scott 695; *U. S. vs. Smith*, Fed. Cas. 16,342a, (1806); *U. S. vs. Skinner*, Fed. Cas. 16,309, (1818); *U. S. vs. Quincy*, 6 Pet. 445, (1832), Scott 706; *U. S. vs. Trumbull*, 48 Fed. Rep. 99, (1891), Scott 731. See also *Nelson*, Att. Gen., 4 op. 336, (1844). Forfeiture of vessels, see, *Ketland vs. The Cassius*, Fed. Cas. 7743; *Gelston vs. Hoyt*, 3 Wheat. 246, (1818); *The Meteor*, Fed. Cas. 9498, (1866), reversed, Fed. Cas. 15,760, Scott 711; *The Mary N. Hogan*, 18 Fed. Rep. 529; *U. S. vs. 214 Boxes of Arms*, 20 Fed. Rep. 50; *The City of Mexico*, 28 Fed. Rep. 148, (1886); *The Carondelet*, 37 Fed. Rep. 799, (1899); *The Conserva*, 38 Fed. Rep. 431; *The Three Friends*, 166 U. S. 1, (1897); *The Itata*, 56 Fed. Rep. 505; *The Laurada*, 85 Fed. Rep. 760, (1898). Restoration of prizes captured by war vessels, see *infra* pp. 135-136.

⁴³*U. S. vs. Trumbull*, 48 Fed. Rep. 99, (1891), Scott 731.

⁴⁴See Scott 720, note. A modern steel warship constitutes a "military expedition" in itself and it cannot be treated as other articles of contraband, the sale of which by private persons is permissible. See *Snow*, cases, p. 437-438; Editorial Comment, *J. B. Scott*, *Am. Jour. Int. Law.*, 9:177, Jan. 1915.

⁴⁵*The Meteor*, Fed. Cas. 15,760, reversing Fed. Cas. 9,498; *The Santissima Trinidad*, 7 Wheat. 283; *LaConception*, 6 Wheat. 235; *The Bello Corrunes*, 6 Wheat. 152; *U. S. vs. Quincy*, 6 Pet. 445; *The Laurada*, 98 Fed. Rep. 983; *Moodie vs. The Alfred*, 3 Dall. 307; 5 op. 92. The contrary view was offered by Attorney General Legare, (3 op. 747) and by Justice Betts, in the *Meteor*, (Fed. Cas. 9,498) although his decision was reversed on this point in the Circuit court, (Fed. Cas. 15,760). The correctness of the

sels to a belligerent a crime, although it was acts of this kind which the United States complained of in the Alabama Claims controversy.⁴⁶

(d) Certain acts which would constitute the ports or territory of the United States a "base of naval or military operations" have been made criminal offenses. The setting on foot of military expeditions, the fitting out and arming of privateers, or augmenting of their force have been mentioned. A joint resolution of April 22, 1898,⁴⁷ authorizing the president to prohibit the exportation of coal or military material. This was amended on March 14, 1912⁴⁸ making such exportation a penal offense except under exemptions specified by the president. This applies only after the president has made a proclamation that "conditions of domestic violence" exist in an "American country" and are being promoted by "munitions of war procured from the United States." An act of March 4, 1915⁴⁹ authorized the presi-

interpretation which excludes the sale of armed vessels from the prohibition of the section is indicated by the fact that a bill to prevent the sale of armed vessels to belligerents was presented in the House of Representatives in 1817. It was lost in the Senate. (See *Annals of Congress*, 14th Cong., 2nd sess. p. 719). Also in 1866, when popular sympathy was aroused over the Fenian uprising and it was felt that the neutrality laws were too strict, a bill was presented in the House to prevent the recurrence of a decision similar to that of Justice Betts in the *Meteor* which had recently been given. The bill consisted of a revision of the neutrality acts including the provision that nothing be construed to prevent the sale of armed vessels to belligerents. This bill was also lost in the Senate. (See *Cong. Globe*, 39th cong. 1st sess. p. 4194-4197, and *House Report*, No. 100, 39th cong., 1st sess). On this general subject see Fenwick, *op. cit.* pp. 37, 48-49, 108-109.

⁴⁶On the Alabama award see, Moore, *Int. Arb.*, 1;495-682, 4;4057-4178; 5;4639-4685; Moore's *Digest*, 7;1059-1076; Montague Bernard, *Historical account of the neutrality of Great Britain during the American Civil War*, London, 1870; Caleb Cushing, *The Treaty of Washington*, N. Y., 1873; Scott, 713-720.

⁴⁷Act April 22, 1898, 30 stat. 739. This joint resolution was a war measure, intended to conserve to the United States the supplies of war material manufactured in the country and had no connection with obligations of neutrality but it was used as a basis for the neutrality proclamation of President Roosevelt, on Oct. 14, 1905, (34 stat. 3183), forbidding the exportation of arms to Dominican Republic where a revolution was going on. See Fenwick, *op. cit.* p. 56.

⁴⁸Act, March 14, 1912, 37 stat. 630.

⁴⁹Act, March 4, 1915, 38 stat. 1226.

dent to direct customs officers to detain vessels which are suspected of carrying fuel, arms, men, or supplies to foreign warships hovering outside of the harbor, and persons engaged in thus using American territory as a base of naval operations are subject to criminal indictment. The provisions of this act were suggested by a circular of the Department of State of September 19, 1914,⁵⁰ in which the detention of vessels engaged in such unneutral acts was authorized.

Fines ranging up to \$10,000, imprisonment ranging up to ten years, and forfeiture of unneutrally used vessels and other property are provided for these various offenses.⁵¹

(3) Besides the criminal provisions, statutes have provided other means for preventing infractions of neutrality. District courts are given jurisdiction of vessels fitted out in violation of neutral duties with authority to condemn them.⁵² The president is authorized to employ the military and naval forces of the country to enforce the provisions of the act after judicial process shall have been ineffective,⁵³ and to require foreign vessels to depart from ports of the United States when such stay would be contrary to international law or treaty.⁵⁴ United States minis-

⁵⁰Circular of the Department of State, Sept. 19, 1914, *Supp. Am. Jour. Int. Law.*, 9; 122, Jan. 1915.

⁵¹Penalties: Accepting foreign commission, fined not over \$2,000, imprisoned not over 3 years, (Penal Code of 1910, sec. 9); enlisting in foreign service, \$1,000, 3 years, (P. C. sec. 10); setting on foot military expedition, \$3,000, 3 years, (P. C., sec. 13); fitting out and arming vessel, \$10,000, 3 years, or 10 years if to cruise against United States citizens, and forfeiture of vessel, (P. C. sec. 11, 303); augmenting force of vessel, \$1,000, 1 year, (P. C. sec. 12); exportation of arms to American country when prohibited by proclamation, \$10,000, 2 years, (Act, March 14, 1912, 37 stat. 630); supplying belligerent vessels from United States ports, \$10,000, 10 years, (Act, March 4, 1915).

⁵²Rev. Stat. sec. 5383, Penal Code of 1910, sec. 12.

⁵³Rev. Stat. sec. 5287, Penal Code of 1910, sec. 14. Only military, not civil force may be used under this authority, see *Gelston vs. Hoyt*, 3 Wheat. 246; *Nelson, Att. Gen.*, 4 op. 336, (1844). This view somewhat modified, 21 op. 273.

⁵⁴Rev. Stat. sec. 5288, Penal Code of 1910, sec. 15. Fenwick expresses the opinion that this section, the same as the preceding, authorizes the president to act only when judicial action is impossible, through lack of jurisdiction due to the public character of the vessel or of sufficient evidence to permit of successful prosecution. It seems, however, as though in terms the president is left discretion as to the occasions upon which the authority may be properly exercised. See Fenwick, *op. cit.* p. 95.

ters in countries where the United States maintains consular courts may issue writs to prevent American citizens enlisting for service against any foreign country, and are authorized to use any military force of the United States available to carry this power into effect.⁵⁵ Collectors of customs are required to detain vessels "manifestly built for military purposes" leaving ports of the United States when circumstances render an unneutral use probable,⁵⁶ or, on order of the president, any vessel suspected of carrying arms or supplies to belligerent war vessels hovering outside of the port.⁵⁷

Armed vessels owned in whole or in part by citizens of the United States, clearing out of ports of the United States, may be required to give bond that they will not be used by the owners themselves to commit hostilities.⁵⁸ This provision was designed to prevent the use of American owned privateers in war. There would be no breach of the bond if vessels were sold to a belligerent and used by him to commit hostilities.⁵⁹

Federal courts are given "authority to hold to security of the peace and for good behavior in cases arising under the constitution and laws of the United States."⁶⁰ This provision has been utilized to aid in the enforcement of neutrality obligations of prevention. In the case of *United States vs. Quitman*,⁶¹ arising in 1854, Quitman refused to answer certain questions of a Grand Jury which was investigating alleged violations of neutrality in connection with the Cuban revolution. For this refu-

⁵⁵Act, June 12, 1860, 12 stat. 77, Rev. Stat. 4090. Consular courts are given jurisdiction over United States citizens promoting "insurrection or rebellion against the government" of the country where the court is located, with power to decree the death penalty provided the United States minister approves. Rev. Stat. sec. 4102. *Supra* pp. 39, 74.

⁵⁶Rev. Stat. 5290, Penal Code of 1910, sec. 17. This provision was suggested by Hamilton's "Instructions to the collectors of Customs of the United States" of Aug. 4, 1793. *Am. St. Papers For. Rel.*, 1:40. The customs collector is liable for detention of vessels without probable cause, see *Hendricks vs. Gonzales*, 67 Fed. Rep. 351.

⁵⁷Act March 4, 1915, 38 stat. 1226.

⁵⁸Rev. Stat. sec. 5289, Penal Code of 1910, sec. 16.

⁵⁹Because of the modern practice of converting merchantmen, although privateering is technically abolished, the provision is not obsolete. It seems probable, however, that it would be wise to extend its provisions to require bonding of vessels against sale to a belligerent, as this is now prohibited by international law. See Fenwick, *op. cit.* pp. 96, 154.

⁶⁰Rev. Stat. sec. 727, Judicial Code, 1911, 36 stat. 1087, sec. 270.

⁶¹*U. S. vs. Quitman*, Fed. Cas. 16,111, (1854).

sal the court held that under this statute bonds should be required of him to observe the neutrality laws.

EXECUTIVE ACTION

In addition to the authority given to administrative, judicial and executive officers by statute, much authority exists inherently in such officers to enforce neutrality obligations. The opinion has been expressed that the president as chief executive may perform acts necessary to enforce treaties in the absence of statutory authority.⁶² Such matters as preventing abuse of the privilege of asylum by belligerent warships, the passage of troops on neutral territory, and the unneutral use of radio-telegraph stations are prohibited by the Hague conventions as well as customary international law and may be enforced by executive action. Executive orders have provided for the supervision and censorship of radio-telegraph stations,⁶³ and the detention of vessels suspected of carrying supplies to belligerent warships,⁶⁴ on this basis. The shipping of submarines for sale to a belligerent power has also been prevented by executive action.⁶⁵ The executive disapproval of loans to belligerents, although not required by international law, is another illustration of inherent executive authority in these matters.⁶⁶

Courts have held that jurisdiction of vessels fitted out in violation of neutrality, or prizes taken by them, is inherent in the admiralty and prize jurisdiction, and may be exercised in the absence of statute.⁶⁷ A large range of discretionary power to prevent unneutral use of territory or unneutral acts by American citizens undoubtedly exists in revenue officers, marshals and other civil officers of the United States.

⁶²Ex Parte Toscano, 208 Fed. Rep. 938, (1913); See also In re Debs, 158 U. S. 564, (1895), on inherent power of executive and judicial officers to carry out the obligations and functions of government.

⁶³Executive Order, Aug. 5, 1914, Supp. Am. Jour. Int. Law, 9; 115, Jan., 1915.

⁶⁴Circular of Dept. of Stat., Sept. 19, 1914, Supp. Am. Jour. Int. Law., 9; 122, Jan., 1915.

⁶⁵Letter by Secretary of State Bryan, Dec. 7, 1914, Am. Jour. Int. Law, 9; 177, (Jan., 1915). Also Editorial Comment, J. B. Scott, *Ibid.*, 9; 177. See also circular of Dept. of State with reference to the status of armed merchant vessels, 1914, permitting detention of suspected vessels by port authorities. Supp. Am. Jour. Int. Law, 9; 121, (Jan., 1915).

⁶⁶See Editorial Comment, Am. Jour. Int. Law, 8; 856 (1914).

⁶⁷Glass vs. The Sloop Betsey, 3 Dall. 6, (1794); Talbot vs. Jansen, 3 Dall. 133, (1796); The Estrella, 11 Wheat, 298, (1819).

COMMERCIAL EMBARGOES

Another class of acts which relates somewhat to the enforcement of duties of prevention are the embargo acts passed at different times. The acts of 1898 and 1914 requiring an embargo on arms under certain conditions have already been mentioned. Of somewhat different character are commercial embargoes,⁶⁸ the most important of which were those passed during Jefferson's administration, while the United States was a neutral during the Napoleonic wars in Europe.

There is not and never was a rule of international law which requires a neutral state to prevent shipments of merchandise or of arms to a belligerent or to any one else. This is specifically stated in the Hague Conventions of 1907.⁶⁹ The self-made "international law" in the extraordinary Berlin and Milan decrees of Napoleon and the British order in council⁷⁰ forbade neutral commerce with practically all of Europe, and it might be inferred that the American Embargo of 1807 to 1809 was in aid of these decrees. It must be understood, however, that these decrees and orders did not assert that neutral states were under obligations to prevent their subjects engaging in such commerce. They simply asserted that the ordinary rule of self-help, by which belligerents can seize neutral vessels as prize, would be applicable to a much wider range of circumstances than permitted by the ordinary rules of blockade, contraband and unneutral service.

The embargo and non-intercourse acts are therefore to be regarded as rules of domestic policy, dictated by reasons entirely unrelated to international law. It was not to aid in the enforcement of its duties as a neutral either under international law or under the law asserted by Napoleon's decrees or the British orders in council that they were enacted. Their purpose was rather one of retaliation against these extensions of international

⁶⁸Embargo acts, Mch. 26, 1794, 1 stat. 400; Apr. 2, 1794, 1 stat. 401; Apr. 18, 1794, 1 stat. 401; May 22, 1794, 1 stat. 396; June 4, 1794, 1 stat. 372; Dec. 22, 1807, 2 stat. 451; Jan. 9, 1808, 2 stat. 453; Mch. 12, 1808, 2 stat. 473; Apr. 25, 1808, 2 stat. 499; Jan. 9, 1809, 2 stat. 506, act of Dec. 22, 1807 repealed Mch. 1, 1809 and non-intercourse act in reference to France and England substituted. See Moore's Digest, 7:142-144.

⁶⁹Hague conventions, 1907, v, art. 7, Malloy, p. 2298; xiii, art. 7, Malloy, p. 2359.

⁷⁰For text of British Orders in Council and Napoleon's decrees, see Am. St. Pap., For. Rel., 3:262-286; British and Foreign State Papers, 8:401-513; De Martens, Nouveau Recueil, 1:433-549.

law. It is noteworthy that the enactment of the embargo by the United States permitted Napoleon to extend his view of international law even further by his Bayonne decree⁷¹ ordering the seizure of all United States vessels at sea on the ground that he was simply helping the United States enforce its own law. This view was of course unwarranted. No domestic law of the United States could add to the belligerent rights of either party to the war.

INTEROCEANIC CANALS

The United States has recognized special obligations of prevention as encumbent upon it in relation to the Panama Canal, by treaty, and has provided for their enforcement by executive orders. In its treaties with New Granada, (now Colombia) of 1846,⁷² and with Nicaragua of 1867,⁷³ the United States guaranteed the neutrality of any canal that might be constructed in either of these countries. In the Clayton-Bulwer treaty with Great Britain of 1850,⁷⁴ the two countries agreed jointly to guarantee the neutrality of any interoceanic canal in the central American region, but it was provided that neither should exercise exclusive control of such a canal. The Hay-Pauncefote treaty of 1901⁷⁵ superseded this treaty. Great Britain accorded the United States the right to construct and maintain a canal and to provide regulations for managing it. The United States agreed to adopt substantially the rules of the Suez canal convention to ensure its neutralization. Specific regulations require the United States to prevent, in the canal or adjacent waters to a three mile limit, blockades, the exercise of belligerent rights, hostile acts, the revictualing of belligerent vessels, the embarkation or disembarkation of troops or munitions of war except in case of accidental hindrance of transit. It must compel vessels to complete transit with the least possible delay and must enforce the twenty-four hour stay and twenty-four hour interval rules. To perform these duties the United States is authorized to use necessary military force.

In its treaty of 1903 with the Republic of Panama⁷⁶ the United States guaranteed that country's independence and was

⁷¹Bayonne Decree, Am. State Pap., For. Rel., 3;291.

⁷²Treaty with Colombia, 1846, art. 35, Malloy, p. 312.

⁷³Treaty with Nicaragua, 1867, art. 15, Malloy, p. 285.

⁷⁴Treaty with Great Britain, 1850, Malloy, p. 660.

⁷⁵Treaty with Great Britain, 1901, Malloy, p. 782.

⁷⁶Treaty with Panama, 1903, art. 1, 18, 23, Malloy, p. 1349.

guaranteed complete sovereign rights in perpetuity over a strip of territory known as the Canal Zone, extending five miles either side of the canal route exclusive of the cities of Panama and Colon. The United States guaranteed the perpetual neutrality of the canal and agreed to use armed force and if necessary erect fortifications in the canal zone for that purpose.

The canal was completed in 1914 and regulations for its operation and navigation were promulgated by executive order July 9, 1914.⁷⁷ Following the outbreak of European war in August, 1914, the president promulgated supplementary rules under date of Nov. 13, 1914,⁷⁸ designed to carry out treaty requirements for preventing unneutral acts in the canal. The regulations were based on the Hay-Pauncefote and Panama treaties, the Suez Canal convention of Oct. 29, 1888,⁷⁹ the rule issued thereunder on Feb. 10, 1904⁸⁰ following the outbreak of the Russo-Japanese war, and the general requirements of neutrals as defined in the Hague conventions.⁸¹ These rules defined public armed vessels and auxiliary belligerent vessels, for both of which classes it prescribed the rules required by the treaties mentioned. The enforcement of these regulations was ensured by requiring vessels to give written assurances to obey them before entering the canal. In addition to the treaty requirements the regulations forbade the presence of more than six war vessels of one belligerent or its allies in the canal or adjacent waters at a time, and the passage of air craft over the Canal Zone. A protocol was concluded with the Republic of Panama in October, 1914,⁸² to ensure the cooperation of that republic in carrying out the neutrality requirements that a war vessel be prevented recoaling in the same country within a period of three months. For the purpose of this requirement, the Republic of Panama and the Canal Zone were considered the same country.

⁷⁷Rules and Regulations for the operation and navigation of the Panama Canal, July 9, 1914.

⁷⁸Proclamation prescribing rules and regulations for the use of the Panama Canal by belligerent vessels, Nov. 13, 1914. For text see *Supp. Am. Jour. Int. Law.*, 9;126, Jan. 1915. See also editorial comment in *Am. Jour. Int. Law.*, 9;167, Jan. 1915.

⁷⁹Convention of Constantinople, Oct. 28, 1888, *Martens, Nouveau Recueil*, ser. II; 15;557; *British and Foreign State Papers*, 78;18.

⁸⁰Rules for the use of the Suez Canal by belligerent vessels, Feb. 10, 1904, *British and Foreign State Papers*, 102;591.

⁸¹Hague conventions, 1907, xiii, *Malloy*, p. 2352.

⁸²Protocol with Panama, 1914, *Supp. Am. Jour. Int. Law.*, 9;128, Jan. 1915.

It will be seen that the duties of prevention undertaken in these regulations are largely the same as those required of all neutral territory. The requirements are, however, stricter in some cases, as the rights of fueling, repairing, and replenishing stores are more limited. The regulation interprets the twenty-four hour stay rule as permitting a twenty-four hour stay in addition to the time occupied in transit of the canal.

The regulations seem to have adequately covered the duties specifically undertaken by the United States in reference to the Canal, as well as the duties incumbent upon it for preserving the neutrality of all its territory.

ACTS BY AGENCIES OF GOVERNMENT

Aside from the duties of prevention incumbent upon the United States in reference to its civil population, international law and treaty require it to prevent unneutral acts by public officers. On the outbreak of wars, special instructions have been generally sent to diplomatic officers, often relating especially to duties imposed upon such officers in belligerent countries in case affairs of the other belligerent are entrusted to them. On the outbreak of the Russo-Japanese war in 1904 an executive order directed "all officials of the government, civil, military and naval—not only to observe the President's proclamation of neutrality but also to abstain from either action or speech which can legitimately cause irritation to either of the combatants."⁸³

The Navy regulations enjoin naval officers to observe strict neutrality on all occasions.⁸⁴ These regulations can be enforced by court martial, a procedure resorted to in the case of an unneutral act by a naval commander in 1844 during the war between Montevideo and Buenos Ayres.⁸⁵

The obligations of prevention incumbent upon neutral states have been recognized by the United States in treaties and statutes, and the duties thus recognized seem to be in accord with international law. The failure of statutes to recognize the duty to prevent sales of armed vessels to belligerents is only an apparent exception, as the United States has acceded to this principle in the Treaty of Washington and the Hague conventions of 1907,

⁸³Executive Order, March 10, 1904, For. Rel., 1904, p. 185, Moore's Digest, 7:868. See also instructions to diplomatic and consular officers, Aug. 17, 1914, Supp. Am. Jour. Int. Law, 9:118, (Jan., 1915).

⁸⁴Navy Regulations, 1913, sec. 1502, 1633-1624, 1645, 1647.

⁸⁵Moore's Digest, 1:178.

which are according to the constitution a part of the law of the land.

The means relied on for enforcing these duties are (1) the deterrent effect of criminal punishment by fines and imprisonment, (2) the forfeiture of property involved in violations of neutrality, (3) the requirement of bonds of good behavior in suspicious cases, (4) the grant of jurisdiction to courts over cases involving breaches of neutrality, with implied power to enforce their judgments, (5) direct executive action to enforce criminal provisions, expel or detain foreign vessels, and otherwise prevent illegal acts, with a resort to the army, navy, and militia of the United States if necessary, (6) control of public officers by executive action and by courts martial.

While specific provision is made by statute for the use of these means in many cases, it seems probable that where such authority is not given by statute, executive and judicial officers can apply appropriate means for enforcing the duties specified by treaty or the Hague conventions. Treaties are part of the law of the land, and the executive and judiciary, being under oath to enforce the laws, can, it would seem, use all available means to enforce them.

In the field of international law defining neutral duties the United States holds an honored position. Its early neutrality statutes enforcing obligations in this field laid down a standard of conduct which was not required by international law at that time but has since become recognized as obligatory. The neutrality act of 1794 was influential in creating new international law. Canning said of American practice in this respect, "If I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson."⁸⁶ This unique position

⁸⁶Cited, Syngman Rhee, *Neutrality as influenced by the United States*, Princeton, 1912, p. 106. See also opinion of J. W. Foster, and of Rhee, *Ibid.*, pp. 104, 111. W. E. Hall, not inclined to flatter the United States, says of its practice in reference to neutrality obligations, "The policy of the United States in 1793 constituted an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinion as to what these obligations were, and in some points it even went farther than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now admitted by the community of nations." W. E. Hall, *A Treatise on International Law*, 4th ed., London, 1895, p. 616.

is undoubtedly due in large measure to the situation of the United States as the most important power of European civilization remaining neutral in various European wars. It indicates, however, the effect which municipal law may have in creating new international law.

CHAPTER IX. OBLIGATIONS OF VINDICATION.

INTRODUCTORY

Duties of vindication are necessitated by the failure of belligerent troops, warships or prize crews to observe their obligations as belligerents toward neutrals, and some of them also imply a failure on the part of the neutral state to perform its duties of prevention. Thus a neutral state is bound to prevent hostilities in its land or water territory, but if it fails in this it must perform its duty of vindication by interning troops, or restoring prizes captured in the course of such hostilities.

Most of the obligations of this kind are specified in the Hague conventions, and consist of measures to be taken by the neutral state in case of violations of its territory by land forces, hostilities in its territorial waters by naval forces or violations of the right of asylum by belligerent warships or their prizes.

There are a number of general requirements laid down for belligerent warships which a neutral is at liberty to modify by law. Thus a neutral state is permitted to vary the general rule demanding that all belligerent vessels be equally permitted to enter its ports, by forbidding such entrance to vessels which have violated its neutrality.¹ It may also vary the twenty-four hour stay rule by municipal regulations,² and the general rule permitting no more than three belligerent warships in a port at one time.³ The conventions also give a neutral power the right to grant asylum to belligerent prizes on condition that it sequester them, pending adjudication, but this provision was not ratified by the United States.⁴

¹Hague Conventions, 1907, xiii, art. 9, Malloy, p. 2352.

²*Ibid.*, xiii, arts. 12-14, 19.

³*Ibid.*, xiii, art. 15.

⁴*Ibid.*, xiii, art. 23. This permission was a variation from the general rule laid down in articles 21 and 22 which forbade the giving of asylum to prizes except in cases of "unseaworthiness, stress of weather, or want of fuel or provisions," and even then only temporarily. The United States ratified the convention with a proviso excluding article 23, thereby recognizing it as neutral duty to refuse to permit prizes to be sequestered in her ports. See Naval War College, *International Law Situations*, 1908, p. 76. It is interesting to note that the United States had specifically permitted the sequestration of prizes in a number of its early treaties. See

International law in these cases imposes a belligerent duty but no corresponding neutral duty of vindication. The belligerent duty is for the benefit of the neutral and if the neutral indicates by local law that it does not care to avail itself of this benefit international law is unconcerned. These subjects therefore do not form obligations of vindication; they are rather exceptions to those obligations.

Eliminating these exceptions, the duties of vindication recognized by the United States by treaty may be classified as (1) the internment of belligerent troops violating neutral territory,⁵ (2) the internment of belligerent warships violating the law of asylum,⁶ (3) the expulsion of belligerent warships after a twenty-four hour stay, subject to exceptions,⁷ (4) the detention of belligerent warships in accordance with the twenty-four hour interval rule,⁸ (5) the restoration of prizes captured in neutral waters or brought into neutral ports in violation of the law of asylum, and the internment of the prize crew.⁹ These are positive duties imposed upon the neutral state, and failure to perform them will furnish grounds for diplomatic complaint and demand for reparation by the injured belligerent.

The performance of these duties involves an assertion of jurisdiction over foreign prizes, warships or armed forces, agencies which under ordinary circumstances are exempt from the jurisdiction of any sovereign but their own. It is therefore of importance to investigate the measures which the United States has taken for performing its duties of vindication by the exercise of this extraordinary jurisdiction. The subject may be conveniently divided into the three parts, (1) illegal prizes, (2) illegal

treaties with France, 1778-1789, art. 17, p. 474; 1800-1809, art. 24, p. 504; Netherlands, 1782-1795, art. 5, p. 1245; Sweden, 1783-1799, revived 1816, 1827, art. 19, p. 1732; Prussia, 1785-1796, art. 19, 21, p. 1493; Great Britain, 1794-1807, art. 25, p. 604. Treaties with Tripoli, 1805, art. 17, p. 1792 and with Algiers, 1795-1815, art. 10, p. 3; 1815-1830, art. 18, p. 10, permitted United States vessels to sequester and sell prizes in their ports and forbade the sale of prizes taken by any of the Barbary states from the United States in a similar manner. Asylum to merchant vessels and in most cases to warships and privateers also when necessitated through "stress of weather or pursuit of pirates or enemies" is provided for in treaties with twenty-five countries, a few of which are still in force.

⁵Hague Conventions, 1907, v, arts. 11-12, Malloy, p. 2300.

⁶*Ibid.*, xiii, arts. 21, 24.

⁷*Ibid.*, xiii, arts. 12, 13.

⁸*Ibid.*, xiii, art. 8.

⁹*Ibid.*, xiii, arts. 3, 21, 24.

acts of belligerent warships, (3) violations of land territory. The mere fact that these duties are contained in the Hague conventions, which are treaties and "the law of the land" would furnish ground for the assertion of jurisdiction by judicial and executive officers, but in some cases jurisdiction has been specifically conferred by statute, and in others it is necessary to consider the view which the courts and executive authorities have taken as cases have arisen. We will therefore consider the supplementary laws enacted for carrying out these obligations, and the rules laid down by the executive and judicial officers themselves in carrying them out.

ILLEGAL PRIZES.

The neutrality laws give the United States district courts a jurisdiction over captures made in the territorial waters of the country,¹⁰ and imply that a jurisdiction exists over prizes taken by privateers outfitted in the United States.¹¹ This provision contained in the original neutrality act of 1794¹² was enacted as a result of Washington's address to congress of Dec. 31, 1793,¹³ in which he urged upon congress the enactment of neutrality acts, and also provisions ensuring a sufficient jurisdiction in the courts to carry out the duties of restoring illegal prizes. It seems probable that United States courts can assume jurisdiction over illegal prizes under their general admiralty and prize jurisdiction even in the absence of statute, as was in fact done in the cases of *Glass vs. The Betsey*¹⁴ and *Talbot vs. Jansen*,¹⁵ both of which came before the court before the passage of the first neutrality act. The view was emphatically stated in the case of the *Estrella*¹⁶ that the jurisdiction existed independently of statute. Furthermore, so far as the writer has been able to discover, there has never been a case before the court in which the capture was made in the territorial waters of the United States, and in which

¹⁰Rev. Stat. Sec. 5287, Penal Code of 1910, sec. 14.

¹¹Rev. Stat. Sec. 5287, Penal Code of 1910, sec. 14, gives the President power to utilize the military forces of the country to "detain such ship or vessel (violating the neutrality of the United States) with her prize or prizes—in order to restore the prize or prizes in the cases to which restoration shall be adjudged."

¹²Act. June 5, 1794, 1 stat. 381.

¹³See Am. St. Pap., For. Rel., 1;31.

¹⁴*Glass vs. The Sloop Betsey*, 3 Dall. 6, (1794).

¹⁵*Talbot vs. Jansen*, 3 Dall. 133.

¹⁶*The Estrella*, 4 Wheat. 298, (1819).

therefore the jurisdiction explicitly conferred by statute would strictly apply. In all the cases the illegality of the prize has been based on an outfitting of the privateer, or augmenting of its forces, in the United States, prior to the capture. We may therefore safely assert that the jurisdiction exercised by United States courts while the country is neutral, over belligerent prizes, is not dependent on statute.

The nature of the prize jurisdiction while the country is neutral has been discussed at length in a number of cases and with a remarkable concurrence of opinion. The court has always insisted that its jurisdiction does not extend over the question of prize or not prize.¹⁷ This is a matter solely within the authority of the prize courts of the belligerent country, and their determination is conclusive. The neutral's jurisdiction over prizes of war can only arise where (1) its own duty of vindicating its neutrality is involved, (2) where the capture was entirely without evidence of belligerent authorization or for other reason not within the belligerent's prize jurisdiction,¹⁸ or (3) where sal-

¹⁷*L'Invincible*, 1 Wheat. 238, 261; *McDonough vs. Dannery and the Ship Mary Ford*, 3 Dall. 188; *The Alerta*, 9 Cranch, 359, (1815); *The Estrella*, 4 Wheat. 298.

¹⁸This situation occurs where the capture was so clearly unwarranted that the belligerent prize court can not legitimately assert a jurisdiction. There is of course room for difference of opinion in any case as to whether it could or could not, and the question virtually resolves itself into this: Is the belligerent prize court's assertion of its own jurisdiction to be considered conclusive? In *Glass vs. The Sloop Betsey*, (3 Dall. 6, 1794) the supreme court upheld jurisdiction over a capture by a French privateer, apparently on the sole ground that being neutrally owned the vessel was not liable to condemnation in a French Prize court. It is doubtful whether such a jurisdiction would now be maintained. In *Rose vs. Himely*, (4 Cranch 241, 1808) the prize, owned by an American, *Rose*, was seized on the high seas near Cuba for breach of municipal regulations and after sale to *Himely* brought to Charleston. Here it was libeled by the original owner, *Rose*, and while in the custody of the United States District court, a French Prize court in Santa Domingo issued a decree of condemnation upon which *Himely* based his title. The majority of the court though disagreeing in reasons agreed that the Santa Domingo court lacked jurisdiction and consequently *Himely* had no title. Three justices denied its jurisdiction on the ground that actual custody of the prize was necessary. Two justices, including Chief Justice Marshall, held that captures on the high seas for breach of municipal regulations were contrary to international law and so conferred no jurisdiction upon the prize court of the capturing country. Justice Johnson dissented from the decision,

vage or other maritime claims of neutral subjects are involved.¹⁹ In all of these cases the prize must have been brought within the neutral's jurisdiction voluntarily. A neutral state has no right to make seizures outside of its own territory²⁰ or to assume juris-

holding that the prize court's jurisdiction depended upon municipal and not international law and that its own assertion of jurisdiction must be regarded as conclusive by foreign courts; hence the Santa Domingo court had jurisdiction and Himely's title was good. The case does not refer to prize jurisdiction in pursuance of belligerent rights, but the principle that there are limits, beyond which a foreign prize court's assertion of its own jurisdiction will not be regarded as conclusive, although denied by Justice Johnson, seems to have been settled. Consequently there are cases in which the courts of a neutral state may exercise jurisdiction over a prize which the belligerent claims the right to adjudicate, and thereby itself determine upon the belligerent's rights.

¹⁹This situation occurs when the determination of belligerent prize rights arises incidentally to some ordinary maritime claim of a neutral subject. In *McDonough vs. Dannery and the Ship Mary Ford*, (3 Dall. 188, 1795) a French squadron had captured the *Mary Ford*, a British vessel, and after attempting to sink her, left her derelict. She was rescued by a United States vessel which brought her to Boston and libeled her for salvage. Both French and British claimants put in an appearance, the French claiming the balance after deduction of salvage, as legal prize of war, and the British claiming this balance as original owners of the vessel. The supreme court decreed one-third salvage to the United States rescuers, and the balance to the French captors, holding that title to an enemy vessel changed hands immediately on capture. Here the court really decided a question of prize as between the two belligerents, but it was only done incidentally to the adjudication of the neutral parties' claims to salvage, and could be regarded, as was said in discussing the case by Justice Johnson in *L'Invincible*, (1 Wheat. 238, 261) to have been a recognition of the title of the last possessor rather than a determination of belligerent rights. In the *Invincible* the court again assumed jurisdiction, where neutral salvage rights were involved, and in *DelCol vs. Arnold*, (3 Dall. 333), jurisdiction over a prize sequestered in Charleston was based on a maritime tort committed against a neutral owned vessel by the belligerent claimant of this prize. The case was questioned in *L'Invincible*, but justified on the ground that consent had been given by the belligerent claimant to submit the proceeds of his prize to the neutral jurisdiction.

²⁰This statement was denied by Chief Justice Marshall in *Church vs. Hubbard*, 2 Cranch 187, (1804). Scott, 343; He upheld a seizure by Brazil outside of territorial waters in pursuance of a local law. The view stated was however maintained by Marshall in *Rose vs. Himely*, 4 Cranch 281, (1808); See also *Hudson vs. Guestier*, 6 Cranch 281, (1810); *The Apollon*, 9 Wheat. 362. In the case of the *Itata* submitted to arbitration, the

diction over vessels which are not within the actual custody of its court.²¹

The first situation mentioned is the one of immediate importance to the present subject. In the case of the *Brig Alerta*,²² Justice Washington clearly defined the nature of this jurisdiction. "The general rule is undeniable that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought or by a privateer which had been illegally equipped in such country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their own neutrality."

The two cases are distinguished by Justice Washington, (1) where the capture is made in the territorial waters of the United States, and (2) where the capture is made by a vessel which was armed or had its forces augmented in the United States in violation of neutrality.

(1) In the first case jurisdiction is specifically granted by statute²³ but has never been exercised. In the case of the *Grange*,²⁴ Attorney General Randolph gave an official opinion that a vessel captured by a belligerent in Delaware bay, which he regarded as territorial water, should be restored to the United States, but as the vessel was no longer *infra praesidia*, no question of a federal court's prize jurisdiction arose. In several cases where the United States has been belligerent, the neutral state's right to prizes captured in its territorial waters has been upheld²⁵ but apparently the courts have never had a direct

United States was held liable in damages for the seizure of a vessel in Chilean territorial waters. See Moore, *Digest of International Arbitrations*, 3:3067-3071.

²¹*Rose vs. Himely*, 4 Cranch 241, (1808).

²²*The Alerta*, 9 Cranch, 359, 364, (1815).

²³Revised Statutes, Sec. 5287. Penal Code of 1910, sec. 14.

²⁴*The Grange*, 1 op. 33, (1793). On request this vessel was returned by the capturing belligerent power. Moore's *Digest*, 7:1086.

²⁵*The Anne*, 3 Wheat. 435, (1818); *The Florida*, 101 U. S. 37, (1879); *The Sir Wm. Peel*, 5 Wall. 517; *The Adela*, 6 Wall. 266. In *Stewart vs. United States*, 1 Ct. Cl. 113, (1864), the court asserted that the United

opportunity to assert jurisdiction over such a prize while the country was neutral.

(2) In the case of prizes captured by vessels which previously had violated the United States neutrality laws, the exercise of jurisdiction by courts is implied in the neutrality statutes,²⁶ and has been frequently exercised. During the wars immediately following the French revolution, American adventurers, moved by republican sympathy for revolutionary France and possibly fully as much by hopes of gain, frequently fitted out privateers in American ports, obtained French Letters of Marque and forthwith cruised against England, with whom France was at war. It often happened that prizes made by these vessels would be brought into American ports in accordance with the right claimed by France under the treaty of 1778;²⁷ in which case a representative of the original neutral or English owner, generally the English consul, would file a libel for restitution. The court from the first assumed prize jurisdiction in such cases,²⁸ and in several cases restored the vessel.²⁹ A similar situation arose during the revolutionary struggles of the South American republics against Spain and Portugal. Again thoughts of pecuniary gain and republican sympathy combined

States had a just claim against Portugal for permitting a prize to be recaptured by Great Britain in her territorial waters during the war of 1812, and that Portugal had a just claim against Great Britain for performing this act. Indemnity had been obtained from Portugal for some of these seizures by the treaty of 1851. See Malloy treaties, p. 1458, and also General Armstrong Arbitration, Moore, Int. Arb., 2;1071. Commodore Stewart's claims having been ignored in this settlement, it was held he had no claim against the United States. *Supra*, p. 107.

²⁶Revised Statutes, sec. 5287, Penal Code of 1910, sec. 14. *Supra*. p. 131, note 11.

²⁷Treaty with France, 1778-1798, art. 17,22, Malloy treaties, p. 474.

²⁸Talbot vs. Jansen, 3 Dall. 133, (1796); Moodie vs. The Alfred, 3 Dall. 307, (1796); Moodie vs. The Phoebe Ann, 3 Dall. 319, (1796); Geyer vs. Michel and the Ship Den Onzekeron, 3 Dall. 285; Moodie vs. The Betty Carthcart, Fed. Cas. 9,742, 3 Dall. 288, note; Wilkinson vs. The Betsey, Fed. Cas. 17,750, (1799); Moodie vs. The Brothers, Fed. Cas. 9,743, (1799); British Consul vs. The Nancy, Fed. Cas. 1898, (1799); Moodie vs. The Amity, Fed. Cas. 9741.

²⁹Restoration was decreed to a neutral Dutch claimant in Talbot vs. Jansen, 3 Dall. 133, (1796), and to an English claimant in Moodie vs. The Betty Carthcart, Fed. Cas. 9,742, 3 Dall. 288, note, and British Consul vs. The Nancy, Fed. Cas. 1898, (1799).

to lure American privateers into the fray, and frequent cases appear in the reports with the Spanish or Portuguese consul as libellant. Again the United States courts asserted jurisdiction and as before they generally decreed restitution to the original owner.³⁰ The effrontery with which these privateers sometimes put forth their claims was astonishing. On several occasions the expeditions appear to have been nothing short of piracy, as captures were made before any commission was obtained from the South American insurgents. Under such circumstances the owner of the privateer would put forth a claim of expatriation³¹ or of a sale of the privateer to a fictitious South American party,³² claims which were for the most part ignored by the court.³³

³⁰Restitution was denied in *La Amistad de Rues*, 5 Wheat. 385, (1820); the case was remanded for further evidence in *The Divina Pastora*, 4 Wheat. 52, (1814) and in the following cases restitution was decreed: *The Brig Alerta vs. Moran*, 9 Cranch, 359, (1815) *The Estrella*, 4 Wheat. 298, (1819); *La Concepcion*, 6 Wheat. 235, (1821) *The Bello Corrunes*, 6 Wheat. 152, (1821); *The Santissima Trinidad*, 7 Wheat. 285, (1827); *The Gran Para*, 7 Wheat. 471, (1822); *The Arrogante Barcelones*, 7 Wheat. 496, (1822); *The Santa Maria*, 7 Wheat. 490; *The Monte Allegre*, 7 Wheat. 520, (1822); *The Nereyda*, 8 Wheat. 108, (1823); *The Fanny*, 9 Wheat. 659, (1824).

³¹*The Gran Para*, 7 Wheat. 471, (1822).

³²*LaNereyda*, 8 Wheat. 108, (1823); *The Monte Allegre*, 7 Wheat. 520, (1822).

³³In some dicta in cases of this character the court expressed the opinion that a bona fide transfer of the prize to an innocent third party destroyed the taint of illegality, (*The Arrogante Barcelona*, 7 Wheat. 496, 1822) but where such a case arose restitution of the prize was decreed (*The Fanny*, 9 Wheat. 658, 1824). A bona fide sale of the privateer after the illegal outfit in the United States was held to remove the taint of illegality from subsequent captures but such sale must be clearly proved (*The Monte Allegre*, 7 Wheat. 520, 1822; *Moodie vs. The Alfred*, 3 Dall. 307, 1796). It was held that making of repairs with augmentation of force did not amount to a breach of neutrality and consequently did not make prizes illegal (*Moodie vs. The Phoebe Ann*, 3 Dall. 319, 1795; *Geyer vs. Michel and the Ship Den Onzekeran*, 3 Dall. 285). A sale in the United States of prizes captured under a French commission, being impliedly permitted by the French treaty of 1778, (art. 17, 22, Malloy, p. 474) was held to be no breach of neutrality and hence did not make the prize illegal, (*Moodie vs. The Amity*, Fed. Cas., 9741). The United States never admitted that France had an absolute right of sequestrating and selling prizes in the United States under this treaty (*Moore's Digest*, 7:936). Such sales are now forbidden by international law (Hague Conventions, 1907, XIII, art.

It appears that the law of the United States permits of courts exercising jurisdiction over illegal prizes and disposing of them in a manner to fulfill the state's neutral obligation of vindication. It must be noted that the exercise of this jurisdiction implies custody of the prize. If the prize is in a foreign port the United States courts have no jurisdiction, although the case may be such that the government of the United States is under an obligation to demand its return.³⁴

ILLEGAL ACTS BY BELLIGERENT WARSHIPS.

The duty of vindication following an illegal act by a belligerent warship may involve the exercise of jurisdiction, (1) over the officers and crew of the vessel or (2) over the vessel itself. Formerly a distinction was drawn between cases involving public warships and those involving privateers. As privateering is now technically abolished this distinction is no longer important, and even before its abolition the courts declared that for most legal purposes privateers, bearing a commission of the sovereign, were in the same status as public warships.³⁵

(1) It was held in an opinion of Attorney General Nelson in 1844³⁶ that, although belligerent public vessels themselves are not subject to the jurisdiction of United States courts, their commander and officers are and can be criminally prosecuted for breaches of the neutrality statutes. He said, "the very purpose of the act would be defeated were it otherwise; and there is no principle of which I am aware which exempts from responsibility for criminal acts within our jurisdiction the commander or officers of ships of war of other nations with whom we are at peace." While there seem to be no cases in which prosecution of the officers of men of war has been under-

21, Malloy, p. 2361; Moore's Digest, 7;935-938). In any case a bone fide condemnation in a recognized court was held to transfer title conclusively, in the prize, but the condemnation must be satisfactorily evidenced (*La Nereyda*, 8 Wheat. 108, 1823). Where none of these circumstances intervened, restitution to the original owner was decreed, but claims for further damages by the injured owner of the prize were denied (*LaAmistad de Rues*, 5 Wheat. 385). *Supra* p. 108, note 7.

³⁴See Hague Conventions, 1907, xiii, art. 3, Malloy, p. 2359 and United States understanding of it, Senate Resolution of Apr. 17, 1908, Malloy, p. 2366.

³⁵*L'Invincible*, 1 Wheat. 238, (1816).

³⁶Nelson, Att. Gen., 4 op. 336, (1844).

taken, the commanders of privateers holding commissions of foreign belligerent states have been prosecuted when it could be proved that they were still American citizens as is necessary for prosecution under the first section of the neutrality act.³⁷ If a privateer is to be regarded as subject to the same legal exemption as a man of war it would seem that these cases are in accord with Attorney General Nelson's opinion. Prosecution has never been attempted of commanders of privateers under sections of the neutrality acts which are not directed against citizens alone, as for instance section five,³⁸ which prohibits the augmentation of force of warships or privateers in the territory of the United States by any person. A very similar case arose in the criminal prosecution of Alexander McLeod by the State of New York in 1841.³⁹ He was a soldier acting under authority of Great Britain, but nevertheless New York maintained its jurisdiction to punish him criminally for a homicide committed in that capacity, in the State.

At present international law seems to exempt the officers and crew of public vessels from local jurisdiction so long as their acts are in pursuance of official business or take place entirely within the vessel.⁴⁰ This exemption, however, does not extend to acts done on land in violation of local laws, and if the commander of a warship is engaged in augmenting the force of his vessel by the purchase of military materials or the recruitment of men in the territory of the United States and outside of his vessel, it seems probable that he would be liable to the criminal provisions of the neutrality act, although in such a case undoubtedly diplomatic protest would be resorted to rather than criminal prosecution.

The criminal prosecution of the officers of warships is not itself a duty of vindication. Internment of such officers in certain cases is the action required of neutral states. It would seem that executive authorities can exercise jurisdiction over foreign naval forces to perform the duties required by treaties. The internment of land forces has been upheld in the courts⁴¹ and it is probable that the same action as to naval forces is permitted by the law of the United States.

³⁷U. S. vs. Isaac Williams, Fed. Cas. 17,708, 2 Cranch 82; note: In re Henfield, Fed. Cas. 6360, (1793).

³⁸Revised Statutes, 5285, Penal Code of 1910, sec. 12.

³⁹People vs. McLeod, (N. Y.) 25 Wend. 483, 1 Hill 375, (1841).

⁴⁰See Moore's Digest, 2; sec. 256.

⁴¹Ex Parte Toscano, 208 Fed. Rep. 938, (1913).

(2) Whether United States courts can exercise jurisdiction over foreign public vessels which have violated the neutrality of the United States is a question of difficulty. It has been noted that courts can exercise jurisdiction over the prizes captured by belligerent privateers or cruisers in certain cases. The exercise of jurisdiction over the privateer or warship itself is an entirely different question. In the neutrality statutes forfeiture of privateers fitted out in the United States for un-neutral purposes is provided for,⁴² but this may be intended to refer to cases where the vessel was apprehended before being commissioned by the foreign power, and so does not necessarily imply a grant of jurisdiction over foreign public vessels. It has however been interpreted so to apply. In the case of the *Cassius*,⁴³ which was a French public vessel originally fitted out in the United States in violation of the neutrality laws, the vessel was held for a long time pending litigation and ultimately released on a technicality. France had protested at the exercise of jurisdiction over this vessel and finally abandoned it with the intention of protesting the matter diplomatically. Secretary of War Pickering in referring to this case upheld the court's jurisdiction,⁴⁴ for he thought if forfeiture could not be had in such cases the neutrality acts could be completely evaded by transferring illegally fitted out vessels to the foreign government at their first port. The exemption of foreign warships from local jurisdiction was denied by Attorney General Bradford in an opinion of 1794⁴⁵ in which he supported the execution of writs of habeas corpus on a British public vessel in an American port, for the purpose of releasing American citizens held on board. This action gave rise to a protest by the British minister.⁴

The better opinion however seems to be that expressed by Chief Justice Marshall in the *Schooner Exchange vs. McFaddon*,⁴⁶ in which case the court refused jurisdiction of a French public vessel which had entered port in stress of weather and which was claimed by a United States citizen as having been

⁴²Revised Statutes, sec. 5283, Penal Code of 1910, sec. 11.

⁴³*Ketland vs. The Cassius*, 2 Dall. 365. See also *U. S. vs. Peters*, 3 Dall. 121, which was an earlier case involving this vessel, in which the court's jurisdiction was denied.

⁴⁴Letter of Sec. of State Pinckney, Oct. 1, 1795, *Am. St. Pap., For. Rel.*, 1:634.

⁴⁵Bradford, *Att. Gen.*, 1 op. 47, (1794).

⁴⁶*The Schooner Exchange vs. McFaddon*, 7 Cranch, 116, (1812).

illegally made prize by the French. The court held that while the principle of territorial sovereignty was absolute, comity and custom demanded that public vessels be excepted from the general rule, and the court would infer that the government intended to observe the customary rule of comity unless it had expressly declared the contrary. The exemption of foreign public vessels from jurisdiction was emphatically maintained by Attorney General Cushing in 1855⁴⁷ the theory of extra-territoriality being asserted. As has been noted Attorney General Nelson, while maintaining that the officers of public vessels were subject to the territorial jurisdiction, admitted that the vessels themselves were exempt.⁴⁸ This appears to be the rule and therefore, although United States courts can assume jurisdiction over illegal prizes, they cannot over foreign public vessels even when they have violated a duty of international law.⁴⁹

Although courts cannot exercise jurisdiction over foreign public vessels violating neutrality, it is clear that executive officers must do so, if the duties of vindication are to be carried out. If a court exercised jurisdiction it would have authority to declare the vessel forfeited and thus change its ownership. Executive officers can exercise no such authority as this, but they can expel or detain a public vessel, render it incapable of putting to sea and intern its crew when occasion demands. The power to expel⁵⁰ public vessels is specifically given in the neutrality laws to the president, and in the execution of this power he may use the land and naval force and the militia of the country, if necessary. The power to detain vessels violating neutrality statutes is given to the president⁵¹ and also to custom officers⁵² when circumstances render an unneutral use probable. This does not apply to belligerent war vessels in general. It has been held that the president's power can only be used in aid of judicial process, and only military, not civil, officers can be employed.⁵³ A customs officer detaining a vessel

⁴⁷The *Sitka*, 7 op. 123, (1855) Att. Gen. Cushing. See also 8 op. 73.

⁴⁸Nelson, Att. Gen., 4 op. 336, (1844).

⁴⁹For discussion of the exemption of public vessels from territorial jurisdiction see Hall, *International Law*, p. 195.

⁵⁰Rev. Stat. 5288, Penal Code of 1910, sec. 15.

⁵¹Rev. Stat. 5287, Penal Code of 1910, sec. 14.

⁵²Rev. Stat. 5290, Penal Code of 1910, sec. 17.

⁵³*Gelston vs. Hoyt*, 3 Wheat. 246; See also 4 op. 336, (1844), somewhat modified in 21 op. 273.

under this provision does so at his own risk.⁵⁴ On account of these interpretations the statutory provisions seem insufficient to carry out the country's duties of vindication. However, as duties specified in treaties and conventions can probably be exercised by the president in the absence of express statutory authority,⁵⁵ the omission is not serious.

VIOLATIONS OF LAND TERRITORY.

The principal duty of vindication required under this head is the internment of belligerent troops entering neutral territory. Although not acted upon by New York in the case of *People vs. McLeod*,⁵⁶ the general principle that military forces are exempt from territorial jurisdiction is recognized in the United States. The doctrine was stated in reference to troops passing through territory under a license, in dicta by Chief Justice Marshall in *The Exchange vs. McFaddon*,⁵⁷ and in reference to the rights of troops engaged in hostilities in several cases arising out of the civil war.⁵⁸ This does not, however, prevent executive officers performing duties imposed upon the country by treaty. In the case of *Ex Parte Toscano*,⁵⁹ which came before a United States circuit court in 1913, the facts were as follows: During the civil war in Mexico a band of federalist troops defeated at Noveco crossed the frontiers of the United States and voluntarily surrendered to armed forces of the United States. Under order of the president they were disarmed, kept for a time at El Paso and then sent to Ft. Rosecrans, California. Toscano, one of the interned soldiers, sought release on habeas corpus, on the ground that he was unconstitutionally deprived of liberty without "due process of law". This the court denied, holding that the exercise of the authority by the president was fully justified by the Hague convention of 1907,⁶⁰ which had been ratified by both the United States and Mexico. "The treaty," it said, "is full and complete and no legislation is necessary to its enforcement." If congress has not provided special officers for carrying it out

⁵⁴*Hendricks vs. Gonzalez*, 67 Fed. Rep. 351.

⁵⁵*Ex Parte Toscano*, 208 Fed. Rep. 938, (1913).

⁵⁶*People vs. McLeod*, (N. Y.) 25 Wend. 483; 1 Hill 375, (1841).

⁵⁷*The Schooner Exchange vs. McFaddon*, 7 Cranch 116, (1812).

⁵⁸*Neal Dow vs. Johnson*, 100 U. S. 158, 170, (1879); *Coleman vs. Tennessee*, 97 U. S. 509, (1878).

⁵⁹*Ex Parte Toscano*, 208 Fed. Rep. 938, (1913).

⁶⁰Hague Conventions, 1907, v, art. 11, Malloy, p. 2298.

the duty devolves upon the president as chief executive. The Hague treaty itself and the execution of its terms were held to be sufficient to give the applicant his "due process of law", and the writ was denied. From this case it seems that United States law adequately provides for performing this duty of vindication.

The United States has provided for carrying out its duties of vindication (1) by conferring jurisdiction on the federal courts of illegal prizes, with power to restore and liberate such prizes according to international law, and (2) by conferring authority on executive officers to expel, detain and intern war vessels and their officers and crews and to intern belligerent troops crossing the frontier. The degree to which the international duties of vindication are performed depends upon the rules of law acted upon by courts and executive officers in exercising their jurisdiction in these matters. The rules followed by courts are found in court decisions, and are based on the principle that courts of the United States apply international law as part of the law of the United States, while executive officers are bound by the principle that treaties are the law of the land and so perform the duties of vindication as therein specified. With these principles it seems that adequate provision is made in the law of the United States for carrying out the duties of vindication imposed by international law.

PART III. OBLIGATIONS AS A BELLIGERENT TOWARD NEUTRALS

CHAPTER X. INTRODUCTORY.

The obligations of neutral to belligerent states have been classified under the five heads, duties of (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5) reparation. In order to show the relation of belligerent duties to neutral duties we will consider belligerent duties under the same classification.

It must, however, be constantly borne in mind that the position of a belligerent is very different from that of a neutral. A belligerent is always active, while a neutral is passive. Consequently, while it is neutral duties that are prominent, it is belligerent rights which are most noticed. Neutral duties are restrictions upon the ordinary rights of an independent state, while belligerent duties are simply limits set to extraordinary rights.

(1) The belligerent's duties of abstention are largely equivalent in substance to a neutral state's duties of prevention. What the neutral is bound to prevent, the belligerent, in most cases, though not always, is bound to abstain from. Thus a belligerent state is bound to abstain from violations of neutral territory and injury to neutral individuals. These duties so far as encumbent upon the state as such are beyond the province of municipal law to control and so beyond the scope of our subject. When a belligerent neglects its duties of abstention, as Germany did in the violation of Belgian neutrality, it is an act of sovereignty for which the state is internationally responsible but which can not be controlled by municipal law. Some duties of this character have been given recognition in treaties and international agreements, but such stipulations are for the most part directed to the political organs of government and constitute political questions which can not be enforced as municipal law. An exception, however, may be made in one case. The duty to abstain from interference with neutral commerce,

except as permitted by international law, is enforced by municipal law through the adjudication of all neutral seizures in prize courts. This method of enforcing duties of abstention will therefore be considered.

(2) The belligerent's duties of acquiescence relate largely to the neutral's duties of vindication. In performing these duties the neutral state subjects belligerent troops, public vessels and prizes to its jurisdiction in a manner which would be considered as an indignity under ordinary circumstances. These conditions the belligerent must acquiesce in. It must not complain when a neutral interns its troops or ships of war and assumes prize jurisdiction over its captures, provided such acts are required by international law. Acquiescence in such actions or its reverse, however, are acts of sovereignty and beyond the control of municipal law.

(3) The belligerent's duties of prevention bear a relation to the neutral's duties of vindication. Acts which the neutral is obliged to vindicate if committed, the belligerent is obliged to prevent. As the belligerent in exercising rights peculiar to that status comes in contact with neutrals through its army and navy, its duties of prevention require it to exercise control over those agencies of government. It is through this control that municipal law can be most effective in enforcing international obligations of belligerent to neutral states. The municipal means for preventing infractions of international law by such agencies of government will therefore concern us.

(4) A belligerent state has no duty of vindication. It is itself the aggressive party in its relations with neutrals and consequently no occasion is apt to arise for vindicating its sovereign rights as against neutrals. Resembling the neutral's duty of vindication is the belligerent's right of self-help, by which it is permitted to requisition the property of neutrals under certain circumstances, to draft resident aliens into its armies and subject them to numerous inconveniences and losses in case of military necessity, to visit and search neutral merchant vessels, and confiscate them in well defined cases. These acts resemble duties of vindication in that they are acts involving foreign individuals and are specifically defined by international law, but they are in no sense duties. No one but the belligerent is benefited by their performance and there will be no violation of international law if they are not performed. It

is a belligerent right which is here in question and the accompanying duty is that which is owed to the neutral state to abstain from exceeding these privileges and to prevent an illegal exercise of them by its land and naval forces. These subjects are considered under obligations of abstention and prevention.

(5) Reparation is a belligerent duty, but, as noted in the case of a neutral, it is not a duty peculiar to the status of belligerency. It is a duty universally required in cases of breaches of international law. Because of the probability of illegal acts in the heat of war, the question of reparation is particularly prominent in relation to belligerent communities. As examples of reparation by the United States as a belligerent may be mentioned the case of the Florida, in which the United States made public apology for a capture in the territorial waters of Brazil,¹ and the Trent affair, in which the United States restored two confederate officers taken from a British vessel during the civil war.² As the principles of municipal law relating to the enforcement of this duty are applicable to reparation in all cases, further discussion has been given under that head, in the general division of the law of peace.

The obligations of belligerents to neutrals which may be enforced by municipal law will therefore be considered under the two heads, (1) obligations of abstention, and (2) obligations of prevention. In the first case, international law itself defines the obligations which are binding upon the government. Courts in giving effect to such obligations therefore apply international law. In the second case, international law defines the conduct which land and naval forces must pursue in dealing with neutrals, but it does not prescribe the measures which the government must take for enforcing this conduct. The means which may be taken for preventing infractions of international law by agencies of government, are left to the discretion of the belligerent state. They are therefore rules supplementary to international law.

¹Case of the Florida; See Moore's Digest, 2;367: 7;1090.

²Case of the Trent, see Moore's Digest, 2;1001: 7;626, 768.

CHAPTER XI. OBLIGATIONS OF ABSTENTION.

INTRODUCTORY.

A number of obligations of abstention have received specific recognition in treaties and international agreements to which the United States is a party, and are therefore according to the constitution part of the law of the land. In the Hague conventions the United States has bound itself to abstain from exercising war rights against neutrals until it has notified them of the outbreak of war,¹ from committing hostilities in neutral territory or in neutral waters,² and from using neutral harbors or territory as bases of naval or military operations or for the undue asylum of war vessels.³ In special treaties as well as the Hague conventions and the Declaration of London, which, however, is unratified, it has agreed to abstain from injuring neutral individuals in person or property except in accordance with specified rules.⁴ Although so far as these rules bind the state they are sanctioned by considerations of policy rather than by municipal law, yet a belligerent acts through its agencies of government, largely its army and navy. The duties of abstention imposed upon it may be to a considerable extent guaranteed by the control of these bodies through municipal law. Looked at from this standpoint the duties in question become duties of prevention. What a belligerent community is bound to abstain from doing, it is bound to prevent its army and navy from doing. Such duties may be controlled by municipal law and will be considered under obligations of prevention.

Municipal law may also serve to make the obligations effective through the action of constitutional checks between

¹Hague Conventions, 1907, iii, art. 2, Malloy, p. 2266.

²*Ibid.*, 1907, v, art. 1; xiii, art. 1, Malloy, pp. 2297, 2358.

³*Ibid.*, 1907, xiii.

⁴See treaties guaranteeing "free ships, free goods", *infra* p. 164, note 106; specifying rules of blockade, *infra* p. 149, note 12; freedom of vessels under neutral convoy, *infra* p. 182, note 49; freedom of neutral trade, *infra* p. 162, note 95, p. 182, note 50; specifications for the exercise of the right of visit and search, *infra* p. 182, note 51; and the immunity of resident neutral persons from military service, *infra* p. 174, note 9.

departments of government. Thus the courts may be given authority to control the action of the executive in seizing neutral property. This situation actually exists in the provisions of municipal law requiring the adjudication of all maritime seizures by prize courts before their confiscation. The judiciary here, by its power to liberate prizes, acts as a check upon the abuse of authority by the executive, and in so far as it actually applies rules of international law in determining prize cases, enforces the belligerent government's duty to abstain from illegally interfering with neutral commerce.

It must not, however, be forgotten that the prize court, although it may apply international law, is a court of the belligerent state and is always bound by municipal law. It has no authority as against the sovereign power in its state. It is only over one branch of the government that its authority exists.

The fact that the belligerent state controls the prize court, a condition which it was hoped would be remedied by the establishment of an international prize court, inevitably puts the neutral claimant at a disadvantage in litigating, and were it not for the pressure of his own government and the sanctions of international opinion, he would not receive his rights, as is indicated by the distinct difference in the enforcement of neutral rights when most of the great powers are belligerent and when most of them are neutral.

It is the belligerent state's duty to make its prize court, in the words of Lord Stowell, "a court of the law of nations".⁵ Yet as it is a court of the belligerent state the law which it enforces is by definition municipal law. Here therefore we have a case where we should expect to find international law enforced directly as a part of municipal law. We should expect to find the rules applied by prize courts, rules of both international law and municipal law. Both English and American prize courts have on numerous occasions assured us that this is the situation which actually exists,⁶ yet with a few cases to the

⁵The *Recovery*, 6 Rob. 348, (1807). See T. E. Holland, *Studies in International Law*, p. 196.

⁶Cases asserting that prize courts apply international law. English—The *Maria*, 1 Rob. 350, (1799); The *Recovery*, 6 Rob. 348, (1807); The *Minerva*, (1807); The *Fox*, Edw. Adm. 312, (1811); Le *Louis*, 2 Dods. 239, (1817); The *Annapolis*, 30 L. J. Pr. M. and Ad. 201. See also Philimore, *International Law*, 3; sec. 436. For discussion of these cases see Holland, *op. cit.* 196. The first three of these cases are authority for the view that prize courts must apply international law even when con-

contrary we have also been informed that even a prize court is bound to obey a positive mandate of its government, even when in conflict with the law of nations. Lord Stowell seized the dilemma by the horns. "These two propositions," he said, "that the court is bound to administer the law of nations and that it is bound to enforce the king's orders in council are not at all inconsistent with each other," because one could not "without extreme indecency" presume that a conflict could exist.⁷ In the United States Chief Justice Marshall solved the dilemma by resort to the magic power of legal interpretation. "It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country."⁸

Neither Stowell's confidence in the impossibility of a conflict nor Marshall's reliance upon interpretation can obscure the fact that conflicts between the law of nations and of the nation have occurred and have been so direct that no interpretation can avail.⁹ In such circumstances prize courts, the same as any other courts, must obey municipal law.¹⁰ A failure to

trary to municipal law. United States cases—*Talbot vs. Seamen*, 1 Cranch 1, 37, (1801); *The Nereide*, 9 Cranch 388; *United States vs. The Active*, Fed. Cas. 759; *Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191; *The Scotia*, 14 Wall. 170; *The Paquete Habana*, 175 U. S. 677.

⁷The *Fox*, Edw. Adm. 312, (1811).

⁸*Murray vs. The Charming Betsey*, 2 Cranch 64, 118, (1804).

⁹Strangely enough the very case in which Lord Stowell spoke involved just such a conflict. The orders in council upon the basis of which he decreed condemnation of the neutral vessel before him, have been universally denounced as contrary to international law. See article entitled *Disputes with America* in *Edinburgh Rev.*, Feb. 1812, 19; 290, severely censuring Lord Stowell's alteration of opinion from 1798 to 1811, quoted Moore's Digest, 7; 648-651. Phillimore in his international law, 3; sec. 436, implies a similar censure. "If he (Lord Stowell) had not so considered them (i.e. considered the orders in council to be consistent with international law) and nevertheless executed them, he would have incurred the same guilt and deserved the same reprehension as the judge of a municipal court who executed by his sentence an edict of the legislature which plainly violated the law written by the Creator upon the conscience of his creature." See Holland, op. cit. p. 198.

¹⁰*Regina vs. Keyn*, L. R. 2 Ex. D. 160; *The Schooner Exchange vs. McFaddon*, 7 Cranch 116; *Murray vs. The Charming Betsey*, 2 Cranch 64; *Mortenson vs. Peters*, 14 Scot. L. T. R. 227, (1906) Bentwich, p. 12.

do so would be a dereliction of duty on the high way to rebellion. The duty therefore rests with the belligerent state to see that the law applied by its prize courts is international law. We will examine the principles of law thus applied in the United States, in cases involving the rights of neutral individuals. They are to be found largely in prize court decisions, but there have also been statutes, treaties, and executive orders stating principles of this branch of law which the courts are bound to observe.

NEUTRAL PROPERTY AT SEA.

The doctrine is maintained in the United States that title to property seized at sea does not vest until after decision of the court.¹¹ The government, therefore, appears before the prize court as an applicant for condemnation while the neutral individual claims restitution, compensation, damages, or, if the vessel is a recapture, restoration.

The bases upon which condemnation of neutral vessels and property are justified under international law are (1) breach of blockade, (2) carriage of contraband, (3) unneutral service, (4) presumption of enemy character, (5) necessity or the right of angary. The belligerent government will therefore claim condemnation on one of these grounds. The neutral owner will claim restitution if the belligerent does not make good his claim for condemnation; he will claim compensation if in such a case the vessel has been sold, destroyed or requisitioned; he will claim damages if the vessel has been seized without probable cause or has not been treated with proper care in bringing in; or he will claim restoration if he is an original owner of a recaptured prize.

GROUND FOR CONDEMNATION.

(1) *Breach of Blockade.* In a number of early treaties the principles of blockade were laid down, requiring effectiveness and sometimes individual notification of vessels.¹² The

¹¹The *Adventure*, 8 Cranch 221, (1814); The *Nassau*, 4 Wall. 634; The *Nuestra Senora de Regla*, 108 U. S. 92, 103, (1882); The *Tom*, 29 Ct. Cl. 68, 97, (1894); Grundy, Att. Gen., 3 op. 377, (1838). See letter of Sir W. Scott, (Lord Stowell) and Sir J. Nicholl, to Mr. Jay, 1794, stating the general principles of prize law and the necessity of adjudication. Am. St. Pap., 1;494, printed in Moore's Digest, 7;603-608.

¹²Effectiveness has been required in nineteen treaties with thirteen countries, of which the following are in force: Bolivia, 1858, art. 18,

Declaration of London of 1909¹³ lays down the rules of blockade at length. This treaty, however, has not received general ratification, although the United States senate has approved it.

The United States has instituted blockades during the Mexican, Civil and Spanish wars. On these occasions the law to be applied in dealing with neutrals was defined in proclamations declaring the blockades and instructions to naval commanders. The prize courts in applying the law have relied on these treaties, proclamations and instructions in addition to judicial precedents and general principles of international law on the subject. In proclamations and instructions the principles that the blockade must be effective and declared in order to be binding have been generally specified. Individual warning, however, has usually not been required. The whole practice on the subject stating these points was embodied in Stockton's Naval war code in force as a general order of the Navy Department from 1900 to 1904.¹⁴

Malloy, p. 119; Colombia, 1846, art. 18, p. 308; Italy, 1871, art. 13, p. 973; Sweden, 1783-1798, revived, 1816, 1827, art. 10, p. 1728.

Individual notification of vessels ignorant of blockade has been required in twenty-one treaties with seventeen countries, of which the following are in force: Bolivia, 1858, art. 26, p. 120; Colombia, 1846, art. 20, p. 308; Italy, 1871, art. 13, p. 973. Individual warning unless the vessel could have heard of the blockade has been required in six treaties with five countries, of which the following are in force: Sweden, 1827, art. 18, p. 1754; Prussia, 1828, art. 13, p. 1500; Greece, 1837, art. 16, p. 853. See also Moore's Digest, 7;827.

¹³Declaration of London, Charles, Treaties, 1913, pp. 269-272, signed Feb. 26, 1909. Ratification advised by senate, Apr. 24, 1912.

¹⁴Proclamations of Blockade: Aug. 19, 1846, by Commodore Stockton, (Moore's Digest, 7;790, Br. and For. St. Pap. 34;1139); Apr. 19, 27, 1861, by President Lincoln, (12 stat. 1259); Apr. 30, 1861, by Commander Prendergast, (F. H. Upton, Law of Nations affecting commerce during war, 3rd ed., N. Y. 1863, p. 487); Apr. 22, 1898, by President McKinley, (30 stat. 1769). Naval Instructions relating to blockade, May 14, 1846, (Moore's Digest, 7;828; Br. and For. St. Pap., 34;1139); Dec. 24, 1846, (Moore's Digest, 7;790); May 8, 1861, (Prize cases, 2 Black 676); Nov. 6, 1861, May 14, 1862, (Upton, op. cit., p. 490); Aug. 18, 1862, (Official Records, Union and Confederate Navies, Ser. 1, 1;417, Moore's Digest, 7;700); June 20, 1898, (Gen. Ord., Navy Dept., 1898, No. 492, For. Rel. 1898, p. 780, Freeman Snow, International Law, 2nd. ed., Washington, 1898, p. 174); June 27, 1900, Stockton's Naval War Code, (Gen. Ord., Navy Dept., 1900, No. 551, revoked Gen. Ord., Navy Dept., Feb. 4, 1904, No. 150, Printed, Naval War College, International Law Discussions, 1903, p. 112).

The courts have held that proof of three questions of fact is necessary to justify condemnation, (1) existence of blockade, (2) knowledge on the part of the violating vessel, (3) actual or constructive violation.¹⁵ To exist, a blockade must be effective,¹⁶ but a single cruiser may be sufficient to make it so;¹⁷ it need not be declared, *de facto* blockades having been considered legitimate,¹⁸ although they are denounced by the Declaration of London,¹⁹ and it terminates only on notification or occupation of the port.²⁰

Knowledge of the blockade will be presumed²¹ when the vessel left port after notification to that government,²² or had an opportunity to learn of the blockade en route.²³ An individual warning is only necessary when required by treaty²⁴ or where the vessel sailed before notification and arrived in ignorance of the blockade.²⁵

In defining the acts constituting a violation of blockade the courts in the civil war cases seem to have gone beyond the bounds of international law.²⁶ Besides attempting to enter²⁷

¹⁵The *Nayade*, Fed. Cas. 7,046; The *Betsey*, 1 Rob. 29; The *Nancy*, 1 Act. 59.

¹⁶The *Andromeda*, 2 Wall. 48; The *Baigorry*, 2 Wall. 474.

¹⁷The *Olinde Rodriguez*, 174 U. S. 510.

¹⁸The *Adula*, 176 U. S. 361.

¹⁹Declaration of London, 1909, art. 8.

²⁰The *Baigorry*, 2 Wall. 474; The *Josephine*, 3 Wall. 83; The *Circassian*, 2 Wall. 135; The *Adula*, 176 U. S. 361.

²¹Condemnations without special warning—The *Circassian*, 2 Wall. 135; The *Hallie Jackson*, Blatch. 248; The *Empress*, Blatch. 175; The *Prize Cases*, 2 Black 635; The *Revenge*, 2 Sprague 107; The *Hiawatha*, 2 Black 677; The *Admiral*, 3 Wall. 603; The *Cornelius*, 3 Wall. 214; The *Herald*, 3 Wall. 768; U. S. vs. Halleck, 154 U. S. 537; The *Adula*, 176 U. S. 361; The *Cheshire*, 3 Wall. 231.

²²The *Circassian*, 2 Wall. 135.

²³U. S. vs. Halleck, 154 U. S. 537, (1864).

²⁴*Fitzsimmons vs. Newport Ins. Co.*, 4 Cranch 185, (1818).

²⁵The *Nayade*, Fed. Cas. 7046; *Yeaton vs. Frey*, 5 Cranch 335, (1809).

²⁶This is partly accounted for by the fact that the court considered the civil war blockade a municipal rather than an international measure. For an interesting statement of this view, written while the war was in progress, see Upton, *op. cit.*, pp. 298-307. He says, "No one surely whose intelligence is not clouded by prejudice or obscured by selfish considerations can fail to perceive the broad distinction between that blockade which is proclaimed by a sovereign nation of a portion of its own ports, for the purpose of quelling a domestic insurrection and compelling the

or leave²⁸ a blockaded port or hovering about in a suspicious manner,²⁹ the court applied the doctrine of continuous voyage to blockade, condemning cargoes bound for blockaded ports by transshipment.³⁰ No limits to the zone of operations were required. Vessels with an "intent" to break blockade were held liable from the beginning of the voyage to the end of the return voyage³¹ and even on a subsequent voyage.³² These rules were

misguided insurgents to 'unthread the rude eye of rebellion and welcome home again discarded peace', and that which is ordered and enforced by a sovereign government of the ports of its foreign enemy, for the purpose of paralyzing his power and compelling him to repair his wrongs, and submit to the terms of equitable pacification." p. 301. This view is wholly indefensible by modern international law. The law of blockade is for the benefit of neutrals and it makes no difference to them whether the war is rebellion or international war—they have a right to the same law in either case.

²⁷*Fitzsimmons vs. Newport Ins. Co.*, 4 Cranch 185, 200; *McCall vs. Marine Ins. Co.*, 8 Cranch 59; *The Diana*, 7 Wall. 354; *The Nuestra Senora de Regla*, 17 Wall. 29.

²⁸*The Jeune Nelly*, in *U. S. vs. Guillam*, 11 Wall. 47; *The Tropic Wind*, Fed. Cas. 14,186, 16,541a; *The Hiawatha*, Fed. Cas. 6451, affirmed, 2 Black 677; *The Lynchburg*, Fed. Cas. 8637a, 8638, 8639; *The Crenshaw*, Fed. Cas. 3384, affirmed, *The Prize Cases*, 2 Black 635. Days of grace have generally been allowed in which vessels in port may leave. In the civil war cases no cargo could be loaded in this time, *The Hiawatha*, Fed. Cas. 6451, although a limited permission to do so was given by the Navy Instructions of May 8, 1861, see *Prize Cases*, 2 Black, 676. According to the instructions of 1898 and *Stockton's Naval War Code* cargo may be loaded in this time.

²⁹*The Cheshire*, 3 Wall. 231; *The Coosa*, 1 Newb. Adm. 393; *The Hiawatha*, Blatch. 1, Fed. Cas. 6451; *The Empress*, Blatch. 175; *The Josephine*, 3 Wall. 83; *The Dashing Wave*, 5 Wall. 170; *The Teresita*, 5 Wall. 180; *The Newfoundland*, 176 U. S. 97, (1900); *The Cornelius*, 3 Wall. 214.

³⁰*The Circassian*, 2 Wall. 135; *The Springbok*, 5 Wall. 1, (1866); *The Bermuda*, 3 Wall. 514; *The Flying Scud*, 6 Wall. 263; *The Thompson*, 3 Wall. 155. In *The Peterhoff*, 5 Wall. 28 it was held that a transshipment by land could not be regarded as a breach of blockade.

³¹*The Galen*, 37 Ct. Cl. 89, (1901); *The Admiral*, 3 Wall. 603; *The Circassian*, 2 Wall. 135; *The Baigorry*, 2 Wall. 474; *The Cornelius*, 3 Wall. 214; *The Jenny*, 5 Wall. 183; *The Adela*, 6 Wall. 266.

³²*The Mersey*, Fed. Cas. 9,489, reversed Fed. Cas. 9,490; *The Major Barbour*, Fed. Cas. 8,983; *The Joseph H. Toone*, Fed. Cas. 7,541. The principle of liability on a subsequent voyage was not relied upon exclusively in these cases. For discussion see Upton, op. cit. p. 288. Contra, see *The Wren*, 6 Wall. 155.

quite generally denounced by European publicists, although in a number of cases which were subsequently submitted to arbitration the American position was sustained.³³ They are however in conflict with the Declaration of London, which forbids the application of "continuous voyage" to blockade and requires that captures be limited to the zone of operation of the blockading squadron.³⁴

Forfeiture of vessel and cargo has been the usual penalty for breach of blockade, though in a few cases, where the owner of part of the cargo was ignorant of the intent of the vessel, the cargo was restored,³⁵ while in other cases, where, applying the doctrine of continuous voyage, it was the cargo alone which had a blockaded destination, the vessel was released.³⁶

(2) *Carriage of Contraband*. Early treaties generally contained lists of articles which could alone be declared contraband,³⁷ and sometimes free lists were also included.³⁸ One of

³³The case of *The Springbok*, 5 Wall. 1, (1866), in which a cargo destined for transshipment to a blockade runner at Nassau, New Providence was condemned, aroused the severest criticism. It was denounced as a retrogression to the practice of paper blockade so prominent in the Napoleonic wars. See Moore's Digest 7:723-739, in which opinions of Lord Russell, Twiss, Phillimore, Bluntschli, Fiore, and others are given. For arbitral awards under Art. 13, treaty of Washington of 1871, *Ibid.* 7:725, Moore Int. Arb., 4:3928-3935.

³⁴Declaration of London, 1909, art. 17, 19.

³⁵*The Springbok*, 5 Wall. 1; *The Flying Scud*, 6 Wall. 263.

³⁶*The Springbok*, 5 Wall. 1.

³⁷Contraband lists generally consisting of four classes of articles, (1) arms and ammunition, (2) military clothes and accoutrements, (3) horses and their furniture, (4) other instruments especially for use in war have been included in twenty-six treaties, with twenty countries of which the following are in force: Bolivia, 1858, art. 17, Malloy, p. 119; Italy, 1871, art. 15, p. 974; Prussia, 1799-1810, revived 1828, art. 13, p. 1491; Sweden, 1783-1798, revived 1816, 1827, art. 9, p. 1728. Most of these treaties specify that no other articles shall be subject to confiscation as contraband, although this is not true of those with Italy and Prussia. In addition to these classes of articles, the treaty with Great Britain of 1794-1807, (art. 18, p. 601) included navy stores, and stated that "provisions and other articles not generally contraband may be regarded as such" and may be seized upon indemnifying the owner for their value with an allowance for profit, and damages caused by the detention. Treaties with Salvador, (1850-1870, art. 19, p. 1543; 1870-1893, art. 19, p. 1557) add "provisions that are imported into a besieged or blockaded place" to the contraband list, though it is difficult to see why such goods

the most remarkable provisions is that in the Prussian treaties of 1785 and 1799, the latter of which was renewed in 1828 and is still in force,³⁹ in which contraband is declared abolished as between the two countries with the proviso that goods formerly deemed contraband might be detained and requisitioned on payment of full compensation to the neutral owner. The Declaration of London⁴⁰ contains a codification of the law of contraband, embracing lists of absolute contraband, conditional contraband and free goods. These lists, however, have not been adhered to in subsequent wars.

Naval instructions beginning with those of the continental congress of 1776⁴¹ have been issued at the beginning of wars specifying contraband lists and enjoining naval officers to respect neutral rights. Few cases involving contraband were decided in the Revolutionary war, the War of 1812, the Mexican or the Spanish wars. The Civil war cases alone are of importance. In these the courts appear to have been guided largely

would not be liable under the law of blockade, and a treaty with Two Sicilies of 1855-1861, (art. 3, p. 1816) includes "troops whether infantry or cavalry" under the name of contraband. The treaties with Prussia, Italy and Venezuela, (1836-1851, art. 18, p. 1836; 1860-1870, art. 13, p. 1850) exclude horses from the contraband list.

³⁸The treaties with France, 1778-1798, art. 24, p. 496; Spain, 1795-1902, art. 16, p. 1646; Sweden, 1783-1798, revived 1816, 1826, art. 8, p. 1728, among other things put textiles, gold, iron, copper, coal, grain, provisions, navy stores, and lumber on the free list. That with Netherlands, 1782-1795, art. 24, p. 1240, puts navy stores and machines for manufacturing war material on the free list.

³⁹Treaties with Prussia, 1785-1796, art. 13, p. 1481; 1799-1810, revived 1828, art. 13, p. 1491. See *U. S. vs. Diekelman*, 92 U. S. 526 for interpretation of this provision. It has also been made the basis of compensation in the recent (1915) case of the United States vessel *William P. Frye*.

⁴⁰Declaration of London, 1909, Charles, Treaties, 1913, p. 272.

⁴¹Naval instructions April 3, 1776, (*Journal of the Continental Congress*, W. C. Ford, ed., 4; 253, *Journal of Congress*, 1; 244, G. W. Allen, *A Naval History of the American Revolution*, N. Y., 1913, 2 vols., 2:695); Apr. 7, 1781, (*Jour. Cong.*, Ford, ed., 19; 361); 1812, (2 Wheat. App., 80-81; Moore's Digest, 7:516), May 14, 1846, (*Br. and For. St. Pap.* 34:1139), May 14, 1862, (*Upton*, op. cit. p. 490); Aug. 18, 1862, (*Official Rec. Union and Conf. Navies*, Ser. 1, 1:417); June 20, 1898, (*Navy Dept.*, Gen. Ord., 1898, No. 492, *For. Rel.*, 1898, p. 780); June 27, 1900, *Stockton's Naval War Code*, (*Naval War College, International Law Discussions*, 1903, p. 112).

by British precedents, mostly those of Lord Stowell in the Napoleonic era.⁴²

All cases have held that the concurrence of (1) a hostile character in the goods themselves and (2) a hostile destination is necessary for condemnation. The courts have drawn the distinction between absolute and conditional contraband, holding that the former may be condemned if destined to the enemy country,⁴³ while the latter is only liable if bound for the use of the enemy army.⁴⁴ The doctrine of continuous voyage has been applied to both absolute⁴⁵ and conditional contraband.⁴⁶ It was this question which occupied most attention in the Civil war cases. British vessels were in the habit of landing cargoes in the West Indies or in Mexico near the Texan frontier for transshipment in blockade runners or by land to the Confederate states.⁴⁷ Such vessels, if captured on the first limb of the voyage, that is while sailing between two neutral ports, were usually condemned.⁴⁸ The grounds of condemnation were not always clear. In most of these cases, carriage of contraband and breach of blockade were both suggested.

The penalty imposed for carriage of contraband was ordinarily condemnation of the contraband cargo alone,⁴⁹ though free goods of the owner of contraband were generally declared "infected" and condemned.⁵⁰ Evidence of bad faith such as

⁴²On force of British prize court precedents in United States courts see *Marshall in Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191, 198, (1815), quoted *Moore's Digest*, 7:598, "The United States having at one time formed a component part of the British Empire their prize law was our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it."

⁴³*The Peterhoff*, 5 Wall. 28, 58, (1866).

⁴⁴*The Commercen*, 1 Wheat. 382, (1816).

⁴⁵*The Dolphin*, Fed. Cas. 868, (1863); *The Bermuda*, 3 Wall. 514, (1865).

⁴⁶*The Pearl*, 5 Wall. 574, (1866); *The Peterhoff*, 5 Wall. 28, (1866).

⁴⁷For complete statement of the conditions of contraband trade during the Civil war see the *Stephen Hart*, Blatch. 387, (1863), *Scott*, 852, affirmed in the *Hart*, 3 Wall. 559. See also *Moore's Digest*, 7:698-739.

⁴⁸Instructions of the Secretary of the Navy, Aug. 18, 1862, authorized seizure of vessels carrying contraband for the insurgents "to their ports directly or indirectly by transshipment". See *Moore's Digest*, 7:700.

⁴⁹*The Peterhoff*, 5 Wall. 28, (1866); *The Commercen*, 1 Wheat. 382, (1816).

⁵⁰*The Lucy*, 37 Ct. Cl. 97, (1901); *The Bird*, 38 Ct. Cl. 228, (1903); *The Peterhoff*, 5 Wall. 28.

destruction of papers,⁵¹ giving of false destination⁵² and being involved in blockade running⁵³ were held to condemn the vessel also. Ordinarily liability was held to cease with the deposit of contraband goods, but this was not true, the vessel being condemned on her return voyage if a false destination were given.⁵⁴

(3) *Unneutral Service*. The transportation of troops and the carriage of dispatches, which are the commonest offenses included under the offense of unneutral service, are sometimes spoken of as analogues of contraband. In reality the offense is distinctly different from that of carrying contraband. The idea of destination inseparable from contraband trade is not necessarily included. It is the service, ordinarily coupled with an unneutral intent, that creates the offense.⁵⁵ The similarity to contraband trade, however, is evident, and in a treaty of 1855 with Two Sicilies⁵⁶ naval and military troops were included in the contraband lists. A large number of treaties in stipulating that free ships shall make free goods add that enemy persons on neutral vessels shall "not be taken out of that ship unless they are officers or soldiers and in the actual service of the enemies",⁵⁷ thus indicating that persons of the latter class are liable and strongly implying that they may be taken out of a vessel overtaken at sea, a position which was protested by Great Britain in the Trent case.⁵⁸ The Declaration of London

⁵¹The Bermuda, 3 Wall. 514.

⁵²The Lucy, 37 Ct. Cl. 97, (1901); The Joseph, 8 Cranch 451; Car-
rington vs. Merchants Ins. Co., 8 Pet. 494.

⁵³The Dolphin, Fed. Cas. 868; The Pearl, 5 Wall. 574; The Hart, 3
Wall. 559; The Gertrude, Fed. Cas. 5,369, 5,370.

⁵⁴The Lucy, 37 Ct. Cl. 97, (1901); The Joseph, 8 Cranch 451; Car-
rington vs. Merchants Ins. Co., 8 Pet. 494. In the Betsey and Polly,
38 Ct. Cl. 30, (1902), it was held that giving a false destination does
not condemn on return voyage when there is no contraband on board
and the real destination is unblockaded.

⁵⁵On distinction of contraband trade and unneutral service see Mar-
quardson on the Trent case, quoted Moore's Digest, 7;775.

⁵⁶Treaty with Two Sicilies, 1855-1861, art. 3, Malloy, p. 1816.

⁵⁷Seizure of military persons on neutral vessels has been provided
in twenty-seven treaties with nineteen countries, of which the following
are in force: Bolivia, 1858, art. 16, Malloy, p. 119; Colombia, 1846, art.
15, p. 306; Italy, 1871, art. 16, p. 974; Prussia, 1785-1796, revived 1828,
art. 12, p. 1481; Sweden, 1783-1798, revived 1816, 1827, art. 7, p. 1727.

⁵⁸See Moore's Digest, 7;775.

distinguishes two classes of unneutral service.⁵⁹ Lesser offenses subject the vessels to the treatment of neutral contraband carriers, while graver offenses amounting to a direct participation in naval movements subject them to the treatment of enemy merchant vessels.

In the Chesapeake affair of 1807⁶⁰ and in other cases preceding and causing the War of 1812 the United States objected to the taking of military persons from its vessels when neutral. In these cases the illegal impressment of neutral persons was also involved. The Trent affair⁶¹ during the Civil war, which involved the seizure of Confederate emissaries from a British vessel, was settled diplomatically and unfavorably to the right of such seizure. Here the vessel was not brought in for prize adjudication, seizure being made on the sea, but this practice seems to have been contemplated in a large number of the United States treaties of that time,⁶² although not by any treaties with England. It also seems to be countenanced by the Declaration of London.⁶³ The seizure in the Trent case, however, was complicated by the fact that the persons seized were diplomatic emissaries accredited to a neutral government, rather than military persons, and consequently should have enjoyed diplomatic immunities.

No cases involving unneutral service appear to have come up in United States prize courts.⁶⁴ English precedents, however, which are usually of weight in United States prize courts,⁶⁵ have held that vessels may be condemned not only on the basis of employment by the enemy government but also for knowingly or fraudulently giving aid through carriage of troops, military persons or dispatches.⁶⁶ Where knowledge or fraud is

⁵⁹Declaration of London, arts. 45, 46.

⁶⁰See Moore's Digest, 2;991, 1001.

⁶¹See Moore's Digest, 7;768-779.

⁶²Supra, p. 156, note 57.

⁶³Declaration of London, art. 47.

⁶⁴Seizure of vessels engaged in unneutral service was authorized by the Naval instructions of 1898, art. 16, For. Rel., 1898, p. 781, and Stockton's Naval War Code, 1900-1904, arts. 16, 20.

⁶⁵In regard to English prize court precedents in United States courts see *Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191, 198, (1815), Moore's Digest, 7;599, Supra, p. 155, note 42.

⁶⁶Carriage of troops and military persons—*The Caroline*, 4 Rob. 256, (1802); *The Friendship*, 6 Rob. 320, (1807); *The Orozemba*, 6 Rob. 430, (1807); Carriage of Dispatches—*The Atalanta*, 6 Rob. 440, (1808); *The Constantia*, *The Susan*, *The Hope*, see Moore's Digest, 7;759-762.

not proved the vessel has usually been restored but on condition that it pay the captors' expenses,⁶⁷ the ground being taken that the belligerent has a right of seizing, bringing in and investigating neutral vessels suspected of unneutral service, even where condemnation is not warranted.

(4) *Presumption of Enemy Character.* The general rule applies that enemy property at sea is liable to confiscation. The belligerent will therefore claim condemnation of vessels and goods apparently neutral if their real ownership or the actual right to their use is enemy. The enemy or neutral character of property may be determined in a number of different ways, as by the nationality of the owner, the domicile of the owner, the location of the goods, or the flag of the vessel. Where the character of the goods depends upon the character of the owner, the question of who is the owner when goods are in transit arises.

By the Declaration of London,⁶⁸ the neutral or enemy character of a vessel is determined by the "flag which she is entitled to fly" and of goods on board an enemy vessel by the "neutral or enemy character of the owner," the title ordinarily remaining with the seller until the destination is reached.

These principles have been generally adhered to by United States courts, but the character of goods or of their owner has been interpreted in accordance with the Anglo-American principle of territoriality as opposed to nationality. Thus goods owned by an inhabitant of enemy territory, irrespective of his sympathy⁶⁹ or nationality,⁷⁰ have been considered enemy goods. Goods employed in the enemy service⁷⁰ or the produce of enemy soil⁷²

⁶⁷The *Caroline*, 6 Rob. 461, (1808); The *Madison*, Edw. Adm. 224, (1810); The *Rapid*, Edw. Adm. 228, (1810); See Moore's Digest, 7:762-763.

⁶⁸Declaration of London, 1909, art. 58-60.

⁶⁹Mrs. Alexander's Cotton, 2 Wall. 404, 419; The *Benito Estenger*, 176 U. S. 568. See Moore's Digest, 7:429-430.

⁷⁰*Chester vs. The Experiment*, Fed. Court of Appeals, 2 Dall. 41, (1787); *U. S. vs. Gillies*, Pet. C. C. 159; *Murray vs. The Charming Betsey*, 2 Cranch 64, (1804); The *Venus*, 8 Cranch 253, (1814); The *Frances*, 8 Cranch 335, (1814); The *Mary and Susan*, 1 Wheat. 46. See Moore's Digest, 7:424-429.

⁷¹*Darby vs. The Erstern*, Fed. Court of Appeals, 2 Dall. 34, (1782); The *Hart*, 3 Wall. 559; The *Baigorry*, 2 Wall. 474. See Moore's Digest, 7:410-415.

⁷²*Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191, (1815); The *Prize Cases*, 2 Black 635, (1862). See Moore's Digest, 7:406-410.

are also regarded as enemy goods whatever the character of the owner.

The courts have held that title to property in transit is with the vendor. Thus goods enroute from an enemy seller to a neutral buyer, even when sold, are condemned as enemy property⁷³ and goods in transit from a neutral seller to a belligerent buyer are released as neutral property.⁷⁴ It has been hinted, however, that if the contract of sale specified that the transfer should take place on delivery to the master of the vessel, and consideration had been given, a neutral buyer might make good his claim.⁷⁵

In addition to these general principles, international law recognizes certain circumstances which give a constructive enemy character to goods which are really neutral, in which case condemnation is permitted. This constructive enemy character has at different times and by different countries been asserted on the following grounds: (a) transfers to neutral flag, (b) acceptance of enemy convoy, protection or license, (c) resistance to visit and search or fraud, (d) engaging in closed trade, (e) carriage by neutral vessels of enemy goods, (f) shipping of neutral goods on enemy vessels.

(a) By the Declaration of London,⁷⁶ transfers of enemy vessels to a neutral flag are in general valid if made before the outbreak of hostilities, void if made after. Certain provisions and presumptions, however, are added. A more liberal rule has heretofore been applied by United States courts. Thus bona fide transfers of vessels and property, whether made before or after the outbreak of the war, have been held valid.⁷⁷ This has also been the British rule.⁷⁸ The sale, however, is presumed not bona

⁷³The *Ship Frances and Cargo*, 1 Gall. 445, affirmed 8 Cranch 350, (1813); *The Frances*, 9 Cranch 183, (1815); *The San Jose Indiano*, 2 Gall. 268, affirmed 1 Wheat. 308, (1814).

⁷⁴*The Ship Ann Green*, 1 Gall. 274, Scott, 620, (1812).

⁷⁵*The San Jose Indiano*, 2 Gall. 268, affirmed 1 Wheat. 208. See Moore's Digest, 7;404-406.

⁷⁶Declaration of London, 1909, art. 55-56.

⁷⁷Cushing, Att. Gen., 6 op. 638, (1854); 7 op. 538, (1855). See Moore's Digest, 7;715-724.

⁷⁸*The Baltica*, 11 Moore P. C. 141, (1857); *The Ariel*, 11 Moore P. C. 119, (1857). France and Russia have generally applied the principle that sales made after the outbreak of war are void. See French Regulations, July 26, 1778, noted Moore's Digest, 7;417; Russian Prize Regulations, March 27, 1895, quoted Moore's Digest, 7;424. Great Brit-

fide if made in transit⁷⁹ or under conditions such as the retention of enemy control or the reservation of a right to repurchase.⁸⁰ The sale of enemy warships to a neutral has been regarded as void even if bona fide.⁸¹

(b) While the sailing under neutral convoy exempts merchant vessels not only from capture but from visit and search, the acceptance of enemy convoy, of enemy license, or the shipping of goods in an enemy armed vessel has sometimes been held in itself to render the neutral goods and vessels liable to condemnation as of constructive enemy character.⁸² In the leading United States case, however, *The Nereide*,⁸³ the majority of the court, speaking through Chief Justice Marshall, held that neutral goods laden on an armed enemy ship were exempt from capture, and this decision was followed in the *Atalanta*⁸⁴ a few years later. Justice Story dissented in *The Nereide*, holding that a distinction existed between the loading of neutral goods in unarmed and armed belligerent vessels, and the latter case, similar to belligerent convoy, gave the neutral goods enemy character. Story's opinion was followed by the court of claims in a number of French spoliation claim cases.⁸⁵ The condemnation of neu-

ain adopted this rule as a measure of retaliation by order in council, Nov. 11, 1807, Br. and For. St. Pap., 8:468; Am. St. Pap., For. Rel., 3:270. By Naval Instructions of 1870, France somewhat relaxed her practice, and admitted that the presumption of illegality in sales made during war might be overthrown by sufficient evidence. See A. P. Rivier, *Principes du Droit des Gens*, 2 vols., Paris, 1896, 2:414.

⁷⁹*The Ship Frances and Cargo*, 1 Gall. 443, affirmed 8 Cranch 354, (1813); *The Sally*, 3 Wall. 451, 460, (1865).

⁸⁰*The Island Belle*, Fed. Cas. 168; *The Benito Estenger*, 176 U. S. 568, (1899), Scott, 621.

⁸¹*The Georgia*, 7 Wall. 32, (1868); *The Sally*, 3 Wall. 451, 460, (1865). See also the *Texan Star*, Moore, Int. Arb., 3:2360 and an editorial comment by J. B. Scott, Am. Jour. Int. Law, Jan. 1915.

⁸²See Danish Instructions, Mch. 28, 1810, declaring all neutral vessels good prize "which made use of British Convoy". Eighteen United States vessels were seized under this clause and a diplomatic controversy ensued which was settled by a convention of March 28, 1830, Malloy, p. 377, in which Denmark made compensation. See Moore's Digest, 7:496-499.

⁸³*The Nereide*, 9 Cranch 388, (1815).

⁸⁴*The Atalanta*, 3 Wheat. 409, (1818).

⁸⁵*The Nancy*, 27 Ct. Cl. 99, (1827); *The Brig Sea Nymph*, 36 Ct. Cl. 369, (1901). It was held in *The Galen*, 37 Ct. Cl. 89, (1901), that though

tral and national vessels sailing under an enemy license or passport has been decreed in a number of cases.⁸⁶

(c) The Declaration of London⁸⁷ provides that "forceful resistance to the legitimate exercise of the right of stoppage, search and capture" involves in all cases the condemnation of the vessel and of goods belonging to the master or owner. Similar provision was made in the United States naval instructions of 1898 and in Stockton's Naval war code.⁸⁸ The courts have invariably held the captors exempt from liability for making seizures when any of these circumstances exist,⁸⁹ and in a number of cases have condemned the vessel.⁹⁰ In most of the early treaties of the United States, neutral vessels were required to carry passports or sea letters and other papers. In some of them it was also provided that a vessel not carrying such papers could be detained and might be "declared legal prize" by a competent court unless the absence of the papers could be satisfactorily explained.⁹¹ The courts, however, have held that in such cases neutral vessels could not be condemned even in the absence of passports, if other evidence indicated a bona fide neutral character.⁹²

(d) Belligerents have at times condemned neutral vessels for engaging in a branch of enemy trade closed to them in time of peace,⁹³ for trading between enemy ports or even for trading acceptance of belligerent convoy rendered the vessel liable, the liability did not inhere after voluntary separation from it.

⁸⁶The *Julia*, 8 Cranch 181; The *Aurora*, 8 Cranch 203; The *Hiram*, 8 Cranch 444; The *Hiram*, 1 Wheat. 440; The *Ariadne*, 2 Wheat. 143; *Patton vs. Nicholson*, 3 Wheat. 204; The *Langdon Cheves*, 4 Wheat. 103. See *Moore's Digest*, 7;395-398.

⁸⁷The Declaration of London, 1909, art. 63.

⁸⁸Naval Instructions, June 20, 1898. *For. Rel.*, 1898, p. 780; Stockton's Naval War Code, art. 33.

⁸⁹*Del Col vs. Arnold*, 3 Dall. 333; The *Marianna Flora*, 11 Wheat. 1, (1826).

⁹⁰The *Bermuda*, 3 Wall. 514.

⁹¹Non-carriage of passports was declared to subject the vessel to condemnation in sixteen treaties with eleven countries, of which those with Bolivia (1858, art. 22, *Malloy*, p. 121) and Colombia (1846, art. 22, p. 309) are still in force. In six treaties with five countries, of which that with Prussia (1799-1810, revived 1828, art. 14, p. 1491) is still in force, the carriage of passports was required but failure to do so was specifically declared not to create a presumption against the vessel.

⁹²The *Pizarro*, 2 Wheat. 227; The *Venus*, 27 Ct. Cl. 116. (1892).

⁹³See *British Rule of 1756*, *Moore's Digest*, 7;383, also similar rule of 1793, *Order in Council*, Nov. 6, 1793, *Lawrence*, op. cit. p. 717. Historical account of the growth of these rules, 1 Wheat. 530, App. ii.

with the enemy at all.⁹⁴ In a large number of its treaties⁹⁵ the United States has agreed as a belligerent to recognize the right of citizens of the other contracting party to free navigation between neutral and enemy ports and between two enemy ports; and in none of its wars has it condemned neutral vessels, even when not protected by treaty, on the basis of engaging in closed trade.⁹⁶ The condemnation of vessels of American citizens trading with the enemy is based on an entirely different principle and is really not governed by international law at all.⁹⁷ In insurance cases⁹⁸

⁹⁴See Napoleon's Berlin, (Nov. 21, 1806) and Milan, (Nov. 23, 1807, Dec. 17, 1807) decrees and British Orders in Council, (Jan. 7, 1807, Nov. 11, 1807, Mch. 15, 1915). Texts of all but the last, Br. and For. St. Pap. 8; 401-513; DeMarten's *Nouveau Recueil*, 1; 433-549; Am. St. Pap., For. Rel. 3:262.

⁹⁵The freedom of neutral trade has been guaranteed in twenty-five treaties with eighteen countries, of which the following are in force: Bolivia, 1858, art. 15, 18, Malloy, p. 119; Colombia, 1846, art. 15, 18, p. 206; Italy, 1871, art. 16, p. 974; Prussia, 1785-1796, revived, 1828, art. 12, p. 1481; Sweden, 1783-1798, revived, 1816, 1827, art. 7, p. 1727.

⁹⁶Dicta in some civil war cases seems to indicate that such trade creates an enemy character. See *The Hart*, 3 Wall. 560.

⁹⁷The condemnation of property of citizens engaged in trade with the enemy should be regarded as a matter of domestic policy, rather than of international law. Such trade has always been branded as illegal and creating a constructive enemy character by the United States, see *The Rapid*, 8 Cranch 155, (1814); *Rush*, Att. Gen., 1 op. 175, (1814); *The Alexander*, 8 Cranch 169, (1814); *The Sally*, 8 Cranch 382, (1814); *The St. Lawrence*, 8 Cranch 434, (1814); *The Thomas Gibbons*, 8 Cranch 421, (1814); *The Rugen*, 1 Wheat. 63, (1816); *Jecker vs. Montgomery*, 13 How. 498, 18 How. 110. See President Lincoln's proclamation Aug. 16, 1861, prohibiting all trade with the southern states, (12 stat. 1262). See *Moore's Digest*, 7; 391-395. The United States courts have applied the doctrine of continuous voyage to such trade, *The Joseph*, 8 Cranch 451, 454, (1814); *The Grotius*, 8 Cranch 456, (1814). See *Moore's Digest*, 7; 388-391. In *the Mary*, 9 Cranch, 126, 148, (1815), the doctrine of continuous voyage acted to the advantage of a vessel which left England for the United States after the repeal of the British Orders in Council and before the news of the outbreak of the war of 1812, and consequently would have been exempt from capture under the president's instructions of Aug. 28, 1812, had she come home directly. Although she left an Irish port in which she had been forced to take shelter long after she had knowledge of the war, the court held her voyage was continuous from the innocent start in England so she could not be condemned for trading with the enemy. See *Moore's Digest*, 7; 393.

⁹⁸*Vasse vs. Ball*, 2 Dall. 270, (Pa.), See *Moore's Digest*, 7; 387.

the United States courts have denied the legitimacy of condemnations of vessels for engaging in closed trade, or the Rule of 1756,⁹⁹ as it was called. The greater extensions of the claims to limit neutral trade put forth in the Napoleonic wars with increasing severity against neutrals were scarcely admitted even by the belligerent nations as warranted by international law, but were justified if at all as measures of retaliation against enemies. To these restrictions by means of paper blockades the United States was an incessant protestant. The charge that its own practice during the civil war was of similar character has already been mentioned in considering blockade.¹⁰⁰ However, the usual practice of prize courts in the United States is to refuse to condemn neutral vessels for engaging in any trade, unless principles of blockade or contraband can be invoked, a practice which naval forces were required to observe by Stockton's Naval War Code.¹⁰¹

(e) When no question of blockade, contraband or unneutral service is involved, the general principle has been recognized from early times that neutral vessels carrying neutral cargo are exempt from seizure and condemnation. When enemy goods are loaded in a neutral vessel, three principles have at different times been acted on: (1) both goods and neutral vessel are liable, (2) the enemy goods alone are liable, (3) neither goods nor vessel may be condemned. The first principle by which a constructive enemy character is given to the neutral vessel carrying goods, is known as the doctrine of infection. It was sometimes applied in the early eighteenth century, but in recent times it has been universally repudiated and has never been applied in the United States. The second principle was the one generally applied by the United States courts, except where treaties directed otherwise, up to the time of the Spanish war. In spite of the renunciation of the principle by the Declaration of Paris in 1856, and

⁹⁹The Rule of 1756 was inaugurated by Great Britain during a time when practically all colonial trade was closed in time of peace, and it was to this practice that the doctrine of continuous voyage was first applied. In the wars following the French Revolution, United States merchants entered the French West Indian trade which was opened to them, and in order to escape the operation of the rule of 1756, now known as the rule of 1793, transshipped at a port of the United States before going to Europe. Lord Stowell held the voyage continuous and condemned vessels bound for Europe whose cargo had originally come from the French West Indies. See Moore's Digest, 7;383, 1 Wheat. 530, App. ii.

¹⁰⁰Supra, p. 153.

¹⁰¹Stockton's Naval War Code, 1900-1904, art. 19.

the consistent stand of the political department of the government in favor of "free ships, free goods" since the foundation of the republic, the courts continued to announce the condemnation of enemy property on neutral vessels as law during the civil war,¹⁰² although all condemnations were supported by resort to principles of contraband or blockade as well. With this doctrine neutral vessels carrying enemy goods were liable to the inconvenience of seizure and detention until the enemy goods could be removed. As a partial compensation the neutral was usually allowed freight on the enemy goods condemned.¹⁰³ The third principle is known as the doctrine of "free ships, free goods." Although it acts immediately for the benefit of enemy private persons, its adoption has been brought about by the pressure of neutral powers, and it is rather as a concession to the neutral's interest in not having his vessels detained, than for the benefit of belligerent powers, that the doctrine has at length become incorporated into international law.¹⁰⁴ In naval instructions of the Revolutionary War the principle was provided for, and the courts at that time applied it in accord with these instructions.¹⁰⁵ In early treaties beginning with the first treaty concluded by the United States, that with France in 1778, "free ships, free goods" found a place,¹⁰⁶ sometimes though not always coupled with a stipulation for "enemy ships, enemy goods."¹⁰⁷ The political

¹⁰²Early cases. *The Julia*, 8 Cranch 181; *The Nereide*, 9 Cranch 388; *The Antonia Johanna*, 1 Wheat. 159, (1816); *The Ariadne*, 2 Wheat. 143; *The Caledonian*, 4 Wheat. 100. For Judicial opinion during the Civil War, see the *Hiawatha*, Fed. Cas., 6451; *The Hart*, 3 Wall. 559, affirming the *Stephen Hart*, Blatch, 387.

¹⁰³*The Antonia Johanna*, 1 Wheat. 159, *Hoover vs. U. S.*, 22 Ct. Cl. 408, 460, (1887); *The Ann Green*, 1 Gall. 274.

¹⁰⁴The doctrine was first authoritatively advocated by the Armed Neutrality of 1780, sponsored by Russia, see *Moore's Digest*, 7:558-561.

¹⁰⁵Naval Instructions, Apr. 3, 1776; Apr. 7, 1781, Jour. Cong., Ford, ed., 4:253, 19:361, Allen, op. cit., 2:695. See also, *Darby vs. the Brig Erstern*, 2 Dall. 34, ordinance Dec. 4, 1781, Jour. Cong., 7:185, Ford, ed., 21:1158.

¹⁰⁶"Free Ships, Free Goods" has been provided for in thirty treaties with twenty-seven countries, of which the following are now in force: Bolivia, 1858, art. 16, Malloy, p. 1195; Colombia, 1846, art. 15, p. 306; Italy, 1871, art. 16, p. 974; Peru, 1856, art. 1, p. 1402; Prussia, 1785-1796, revived 1828, art. 12, p. 1481; Sweden, 1783-1798, revived 1816, 1827, art. 7, p. 1727; Russia, 1854, art. 1, p. 1520.

¹⁰⁷Of the above treaties in force those with Sweden and Colombia contain the stipulation of "enemy ships, enemy goods." See *infra*, note III.

department of the government has supported this principle as a rule of international law since the establishment of the government,¹⁰⁸ but it was not applied by the courts after the Revolutionary War until the War of 1898. The principle was adopted by most of the powers through the Declaration of Paris of 1856, but this was never acceded to by the United States and during the civil war the courts continued to voice the earlier principle.¹⁰⁹ In proclamations and naval instructions of the Spanish war the principle was adopted, and it was also incorporated into Stockton's Naval War Code.¹¹⁰ It is now undoubtedly law in the United States as well as a principle of international law.

(f) Neutral goods on enemy vessels have also been subjected to varying treatment. The three possible principles are (1) both enemy vessel and neutral goods are liable, (2) the vessel alone is liable, (3) neither the vessel nor the goods may be condemned. The first principle, known as "enemy ships, enemy goods," was frequently applied in the early eighteenth century along with the doctrine of infection at a time when neutrals were so few and lacking in force that their voice commanded no attention, but in recent times it has not been applied as a rule of international law, and was repudiated by the Declaration of Paris of 1856. It has however been frequently stipulated in treaties, as an offset to the concession of "free ships, free goods." The United States has embodied this principle in a number of treaties,¹¹¹ two of which are still in force but probably obsolete in

¹⁰⁸See Moore's Digest, 7:434-453, especially letter of instructions by Secretary of State Cass to United States Minister in France, June 27, 1859, which says, "with respect to the protection of the vessel and the cargo by the flag which waves over them, the United States look upon the principle as established and they maintain that belligerent property on board neutral ships is not liable to capture," p. 450. In spite of this the courts affirmed the opposite view a few years later during the civil war. See *The Hiawatha* Fed. Cas., 6451, *The Hart*, 3 Wall. 559.

¹⁰⁹*The Hiawatha*, Fed. Cas., 6451, *The Hart*, 3 Wall. 559.

¹¹⁰Telegraphic Instructions, Apr. 22, 1898, (Moore's Digest, 7:453); Proclamation, Apr. 26, 1898, (30 stat. 1770); Stockton's Naval War Code, 1900-1904, art. 19.

¹¹¹"Enemy ships, enemy goods" has been provided for in eighteen treaties with thirteen powers, always in combination with the stipulation of "free ships, free goods," and generally with the proviso that goods of the neutral laden on an enemy vessel in a specified time, varying from two to eight months after the outbreak of the war, shall be exempt. Only two of these treaties, those with Peru, 1870-1886, (art. 19, p. 1420) and Salvador, 1870-1893, (art. 16, p. 1556) were concluded after the Declara-

this respect. The second principle, that which condemns the enemy vessel and saves the neutral goods, coupled with the principle that enemy goods in neutral vessels are liable, was laid down in the *Consolato del Mare*,¹¹² a body of sea law of the thirteenth century, and has formed the recognized rule of international law since that time. The principle was adopted in the Declaration of Paris in combination with the principle of "free ships, free goods." Although the United States did not accede to this declaration, in six individual treaties¹¹³ of about that time it was agreed to recognize the two principles as "permanent and inviolable" rules of international law, applicable to all powers who so conceived them. The courts have consistently applied this rule in cases not covered by treaty provisions with a different requirement, but with the presumption that goods in an enemy vessel are enemy.¹¹⁴ The final principle, that which contemplates the exemption of both the enemy vessel and its neutral cargo, when coupled with the existing principle of "free ships, free goods," would logically lead to the total immunity of enemy private property from seizure during war. This is a principle historically advocated by the United States, but is not at present a

tion of Paris. In these two cases existing treaties were merely revised and the clause was probably retained through lack of attention and an automatic copying of old forms; in fact in the Peruvian treaty of 1856, the principles of the Declaration of Paris had been adhered to as permanent and inviolable. At the revision of the Peruvian treaty of 1870 in 1887 the clause was omitted. Two of these treaties, those with Sweden, (1783-1798, revived 1827, art. 14, p. 1730); and Colombia, then called New Granada, (1846, art. 16, p. 307) are still in force. A convention of 1909, with Colombia, (art. 7, Charles, treaties, p. 237), provided that negotiations for the revision of the latter with a view to removing obsolete provisions should be entered into.

¹¹²Text of the Prize Chapters of the *Consolato del Mare* may be found in Wheaton, *History of the Law of Nations*, N. Y., 1845, p. 63; Travers Twiss, *The Black Book of the Admiralty*, Rolls Series, No. 55, 3:539. In his introduction to this work, Twiss gives a very full account of the origin and force of the *Consolato*.

¹¹³Treaties with Bolivia, 1858, art. 16, Malloy, p. 119; Dominican Republic, 1867-1898, art. 15, p. 408; Hayti, 1864-1905, art. 19, p. 926; Peru, 1856, art. 1, p. 1402; Russia, 1854, art. 1, p. 1520; Two Sicilies, 1855-1861, art. 1, p. 1813. The two principles of the Declaration of Paris were incorporated in a treaty with Tripoli of 1805, art. 5, p. 1789.

¹¹⁴The *London Packet*, 1 Mason, 14, *The Amy Warwick*, 2 Sprague, 150; *The Carlos F. Roses*, 177 U. S. 655. (1899), Scott, 637; *The Lynchburg*, Blatch. 57. See also Declaration of London, 1909, art. 59.

rule of international law. In its treaties with Prussia of 1785 and with Italy of 1871,¹¹⁵ the latter of which is still in force, the principle was adopted as between the signatories. As the United States has never been at war with a country with which such a treaty existed, the principle has never been applied by the courts. In the two Hague conferences, the United States delegation urged the adoption of this principle. In the first conference a "voeu" was formally expressed that the question be discussed at a succeeding conference.¹¹⁶ At the second conference in 1907, the matter was discussed at length and a vote was taken¹¹⁷ in which twenty-one powers including Germany, Austria, Italy and the United States voted for; eleven including Great Britain, France, Russia, and Japan voted against it, while one abstained from voting.

(5) *Necessity*. The final rule under which condemnation of neutral property has been claimed is by the rights of preemption and angary.¹¹⁸ It is asserted that in case of necessity the belligerent may seize and use any neutral property provided it is paid for. In a number of treaties preemption rather than confiscation has been provided as the treatment of contraband,¹¹⁹ but the present case relates to the seizure of goods not contraband or condemnable under any excuse other than necessity. Several treaties, among them the Spanish treaty of 1902,¹²⁰ provide that vessels and property of subjects of the contracting parties when neutral shall be exempt from seizure except in case of ne-

¹¹⁵Treaties with Prussia, 1785-1796, art. 23, p. 1484; Italy, 1871, art. 12, p. 973. In a treaty with Bolivia of 1858 the contracting parties agreed to give asylum to privateers until they should relinquish that practice, "in consideration of the general relinquishment of the right to capture private property on the high seas," (art. 9, p. 117).

¹¹⁶See Moore's Digest, 7:471.

¹¹⁷Deuxieme Conference internationale de la paix, Actes et Documents, 3 vols., The Hague, 1907, 3:832.

¹¹⁸The term "angary" applied to forced service of neutral vessels and is now obsolete. See G. G. Wilson, Handbook of International Law, St. Paul, 1910, p. 416. Preemption refers to the forced sale of property. See Wilson, op. cit., p. 437.

¹¹⁹Treaties with Great Britain 1794-1807, art. 18, p. 601; Prussia 1785-1796, art. 13, p. 1481; 1799-1810, revived, 1828, art. 13, p. 1491. For interpretation of the Prussian treaty see U. S. vs. Dieckelman, 92 U. S. 526. It has also been made the basis of compensation in the recent case (1915) of the United States vessel William P. Frye.

¹²⁰Treaty with Spain, 1902, art. 5, Malloy, p. 1703.

cessity, and then compensation shall be given, to be arranged beforehand if possible.

Recognition of the right of requisitioning neutral property in case of necessity is given in the Declaration of London, the Hague Conventions, Lieber's instructions of 1863, the naval instructions of 1898 and Stockton's naval war code of 1900 to 1904.¹²¹ In all of these cases, however, full payment for such requisitions is stated as an obligation.

CLAIMS OF THE NEUTRAL OWNER.

Having considered the claims which the captor state will offer as a basis for the condemnation of neutral prizes, the claims of the neutral owner involved may be considered. These claims may be grouped under the heads, (1) restitution, (2) compensation, (3) damages, (4) restoration.

(1) Restitution of the actual property has been recognized by the United States courts as the proper course in all cases where the government does not make good its claim to condemnation. It is the logical corollary of the principle that title to property does not change until after the decision rendered by the prize court. If the court does not support the government's claim for condemnation, the original owner's title has never been lost and he can claim the goods.

(2) Restitution, however, may be impossible. The cargo may have been requisitioned or destroyed. If enemy goods on board are condemned, a practice now repudiated, the shipper can not get freight from the consignee. In such cases the courts have held compensation to be due the innocent neutral,¹²² but this is subject to important limitations. The seizure may have been justifiable because of suspicious circumstances, although there is no condemnation. Here losses caused by delay must be borne by the owner. Part of the cargo may have been destroyed through accident or the lawful exercise of belligerent rights by

¹²¹Declaration of London, art. 29, 49-54; Hague Conventions, 1907, iv, annex, art. 52, v, art. 19; Instructions for the government of the Armies of the United States in the Field, by Francis Lieber, Apr. 24, 1863, Gen. Ord., War Dept., No. 100, printed, Naval War College, International Law Discussions, 1903, art. 14, 38; Naval Instructions, June 20, 1898, For. Rel., 1898, p. 780; Stockton's Naval War Code, art. 3, 6, 14, 50.

¹²²Declaration of London, 1909, art. 64; Hague Conventions, 1907, v, art. 19; Stockton's Naval War Code, art. 6, 14. *The Nuestra Senora de Regla*, 108, U. S. 92, (1882).

the captor. Here again the neutral suffers the loss of freight and goods.¹²³

(3) However, restitution and compensation for actual goods seized may by no means cover the loss of the neutral. Even if the ship and cargo are intact the delay may have caused serious loss through fall of markets or breach of contract. The right of the neutral to damages in such cases has been recognized in the United States courts.¹²⁴ Damages cannot lie against the government for more than the value of the prize under adjudication,¹²⁵ but they may be had from a naval officer if the seizure was made without probable cause.¹²⁶ The burden of proof, however, is always upon the neutral claimant.¹²⁷ Except in a very clear case recovery is impossible.

(4) The claim for restoration differs from those just considered in that it is not brought by the party from whom the vessel was immediately seized, but from a former owner. It arises in cases of recapture from the enemy of a vessel or goods originally belonging to a neutral or national individual.¹²⁸ The validity of the claim depends on whether or not title had passed to the enemy captor before recapture. If it had, the vessel is enemy property, if it had not it is neutral or national property, and must be restored. The different views which have been held on

¹²³The *Antonia Johanna*, 1 Wheat. 159, (1816).

¹²⁴The *Siren*, 7 Wall. 152, (1868); The *Nuestra Senora de Regla*, 108, U. S. 92; *Slocum vs. Mayberry*, 2 Wheat. 1; The *Appollon*, 9 Wheat. 377; The *Lively*, 1 Gall. 315.

¹²⁵In The *Siren*, 7 Wall. 152, (1868), a neutral vessel was run into and sunk by a captured prize. The court held the owner of the sunken vessel could recover to the value of the prize if subject to condemnation, but no more.

¹²⁶*Del Col vs. Arnold*, 3 Dall. 333, (1796); *Little vs. Barreme*, 2 Cranch 170, (1804); The *Eleanor*, 7 Wheat. 345; *Jecker vs. Montgomery*, 13 How. 498; The *Thompson*, 3 Wall. 155; The *Dashing Wave*, 5 Wall. 170; The *Anna Maria*, 2 Wheat. 327; The *Amiable Nancy*, 3 Wheat. 546. See Moore's Digest, 7; 583-597.

¹²⁷The *Marianna Flora*, 11 Wheat. 1, (1826); *Murray vs. The Charming Betsey*, 2 Cranch 64; The *Buena Ventura vs. U. S.* 175 U. S. 384; The *Thompson*, 3 Wall. 185; The *Dashing Wave*, 5 Wall. 170. See Moore's Digest, 7; 598.

¹²⁸The right of restoration has been derived from the Roman *Jus Postliminii*, although that applied to the rule whereby slaves and property on land returned to their former status after reconquest. See Hershey, *op. cit.*, p. 439.

this subject assert that title to captured property vests, (1) immediately on seizure, (2) after twenty-four hours quiet possession, (3) after bringing "*infra praesidia*", (4) after condemnation by a prize court. All of these rules have been at different times acted on by courts and embodied in executive orders,¹²⁹ but the one at present established appears to be the last. The original owner's claim is good until the vessel has been condemned in an enemy prize court.¹³⁰ A statute of 1800,¹³¹ continued by subsequent acts, required restoration to United States citizens where the property had not been condemned by competent authority, and to neutral subjects on a basis of reciprocity.¹³² The neutral can make good his claim only where the law of his country would allow restoration to a citizen of the United States. In any case a deduction of military salvage for the recaptors is allowed before restoration.

The measures taken to enforce the duty of the United States as a belligerent to abstain from illegally interfering with neutral commerce are found in the rules laid down for the courts in treaties, statutes, and executive orders and instructions, but pri-

¹²⁹Vesting of title immediately on seizure was held to be the rule of international law during the Revolutionary War, (see the Resolution, Fed. Ct. of App. 1781, 2 Dall. 1, 4; *McDonough vs. Dannery and the Ship Mary Ford*, 3 Dall. 188, 1796) thus the right of restoration was denied altogether except by way of comity or express ordinance. An ordinance of congress, (Nov. 25, 1775, Journ. Cong., Ford. ed., 3;373) granted restoration of recaptures made before twenty-four hours possession, but the court held this could not apply where the enemy had sold the prize to a neutral, and in any case it applied only to United States citizens (*The Resolution*, Fed. Court. of Appeals, 1781, 2 Dall. 1, 4). The twenty-four hour rule was also recognized in several early treaties as to neutrals, where the captor was a privateer, although restoration was permitted even after twenty-four hours possession and before condemnation when the captor was a public vessel. (See treaties with Netherlands, 1782-1795; Malloy, p. 1243; Sweden, 1783-1798, revived 1827, p. 1730; Prussia, 1785-1796; 1799-1810, arts. 17, 21, pp. 1482, 1492).

¹³⁰*Talbot vs. Seamans*, 1 Cranch 1, (1801); *Murray vs. The Charming Betsey*, 2 Cranch 64, 121, (1804); *The Star*, 3 Wheat. 78, 86, (1818). Restoration even after condemnation has been allowed where the condemnation by the enemy prize court was clearly illegal. See *The Resolution*, 2 Dall. 1, (1781).

¹³¹Act. Mch. 3, 1800, 2 stat. 16, June 26, 1812, 2 stat. 760; June 27, 1813, 2 stat. 793; June 30, 1864, 13 stat. 306, 314; rev. stat. sec. 4652.

¹³²*The Schooner Adeline*, 9 Cranch 244, see *Moore's Digest*, 7;521-533.

marily in the principles of law to which prize courts have habitually adhered. These principles to which American prize courts have professed obedience are (1) the principle that title does not pass until decree of a prize court, (2) the law applied by prize courts is the law of nations, (3) statutes and orders should be interpreted if possible so as not to conflict with international law, (4) treaties, including law making international conventions, are to be applied as part of the law of the land. So long as these principles are adhered to by discreet courts the national duties of this character will undoubtedly be fulfilled. Yet on account of the inevitable tendency of even the most conscientious judges to be swayed by national partisanship the establishment of the international prize court with a final jurisdiction in cases involving neutrals would be a most important addition to these sanctions of neutral rights. The United States has signed the international prize court convention and the senate has recommended ratification. The same is true of the Declaration of the London naval conference designed to serve as a law to be applied by that court. It has therefore done the most in its power to add this sanction also for the enforcement of its duties as a belligerent.

CHAPTER XII. OBLIGATIONS OF PREVENTION.

INTRODUCTORY.

A belligerent state while acting in that capacity is for the most part represented by its army and navy. The part of international law defining the obligations of belligerents to neutrals therefore consists to a considerable extent of rules of conduct for such agencies of government. The land and naval forces may be controlled by municipal law. The obligations of prevention require a state to exercise this control and prevent infractions of international law by its armed representatives.

With the theory of territorial state sovereignty, neutral states have a right, in war as well as in peace, to exclusive control of their territory.¹ As has been noted they are under an obligation to vindicate this right by interning armed forces of a belligerent violating their territory. The belligerent is under an equal obligation to respect this right by preventing such violations of neutral territory.

Although with a strict application of the theory of territorial sovereignty the state's interest in its citizens would vanish as soon as he leaves its frontiers, the actual law recognizes that states have a limited right to protect their citizens on the high seas and in foreign countries. Belligerents must respect this right and prevent injury to such persons and illegal destruction of their property. We may therefore classify the obligations here considered into those of preventing (1) violations of neutral territory, and (2) injury to neutral persons and property. Reserving this as a secondary classification, we will divide the obligations of prevention primarily into those relating to (1) acts by the land forces and (2) acts by naval forces.

ACTS BY LAND FORCES

The probability of land forces violating neutral territory or injuring neutral individuals is much less than in the case of naval forces, yet the United States has recognized by treaty the duty of preventing its land forces performing certain acts.

¹For exceptions to this general statement see *supra* p. 45 et seq.

(1) By the Hague conventions,² a belligerent is forbidden to violate neutral territory by moving troops or convoys of military material across it, erecting wireless stations or other means of communication, or by recruiting corps of combatants thereon. It would therefore appear to be incumbent upon the United States to prevent its land forces performing any of these acts on neutral territory in time of war.

There appear to have been no cases of prosecution of army officers for violating neutral territory in time of war, but in an opinion of the judge advocate general in 1908³ it was stated that the armed forces of the United States should not be permitted to penetrate neutral territory in the process of enforcing the neutrality laws. In the army regulations relating to garrison inspection the inspectors are required to see that the commanding officer is properly executing the laws relating to neutrality and the regulations concerning international courtesy, so far as applicable to his post.⁴

(2) The United States has recognized its duty to prevent the injury of neutral persons through seizure of property on land, in the Hague Conventions.⁵ The general prohibitions relating to seizure of enemy property on land apply to neutrals in enemy territory, and special provisions are included requiring compensation in case railway material is requisitioned. By the principles of Anglo-American law the status of property depends upon its territorial location rather than the nationality of the owner; consequently neutral property on enemy territory is subject to the same consideration as enemy property in that situation.⁶ This question will be more fully considered in deal-

²Hague Conventions, 1907, Malloy, p. 2297, v, Art. 1-3.

³Digest of Opinions of the Judge Advocates General of the Army, 1912, C. R. Howland, ed., p. 106.

⁴Army Regulations, 1913, sec. 889, p. 171-172.

⁵The Hague Conventions, v, Art. 19, Malloy, p. 2297.

⁶On the enemy character of the produce of enemy soil see, *Thirty Hogshead of Sugar vs. Boyle*, 9 Cranch 191, *The Prize Cases*, 2 Black 635, 671. On the enemy character of property of citizens or neutrals domiciled in enemy territory, see, *Chester vs. The Experiment*, Fed. Court of Appeals, 2 Dall. 41, (1787); *U. S. vs. Gillies*, Pet. C. C. 159; *The Venus*, 8 Cranch 253, (1814); *The Frances*, 8 Cranch, 335, 363, (1814); *The Mary and Susan*, 1 Wheat. 46; *Rogers vs. Amado*, 1 Newb. Adm. 400; *The William Bagley*, 5 Wall. 377; *Gates vs. Goodloe*, 101 U. S. 612; *Mrs. Alexander's Cotton*, 2 Wall. 404, 419. On the general subject see *Moore's Digest*, 7:424-434.

ing with the law of war. Suffice it to say here that the Instructions for the government of the armies⁷ state, and the courts have reiterated⁸ that private property cannot be seized on land except by requisition in case of necessity, unless an act of congress especially permits.

In a number of treaties the United States has agreed not to draft resident subjects of the other contracting power for military service in case of war.⁹ With the exception of treaties relating to claims for injuries in specific cases,¹⁰ these treaties appear to contain the only formal provisions imposing duties upon the United States in reference to the injury of persons of neutral states in land warfare. Whether or not a belligerent state is responsible for injuries received by aliens resident in its territory, due to the exercise of martial law, or the conduct of actual hostilities, is not altogether clear in international law.¹¹ Undoubtedly a state is bound to prevent its armed forces unnecessarily and wantonly injuring neutral residents,¹² but it seems clear that it is under no such duty when the actual prosecution of military movements creates a necessity.¹³ The neutral alien assumes the risk of his residence. No statutes, regulations or official opinions of the military law of the United States appear to bear on this point, if we except the provisions relating to the usual exemption of enemy private property contained in

⁷Instructions for the government of the armies of the United States in the Field, Art. 38; Printed in *The Military Laws of the United States*, 1911, p. 1079; *Naval War College, International Law Discussions* 1903, p. 122.

⁸*Brown vs. U. S.*, 8 Cranch 110, (1814).

⁹Treaties with Argentine Republic, 1843, art. 10, Malloy, p. 23; Congo, 1891, art. 3, p. 329; Costa Rica, 1851, art. 9, p. 344; Dominican Republic, 1867-1868, art. 2, p. 404; France, 1788-1798, art. 14, p. 495; Hayti, 1864-1905, art. 8, p. 923; Honduras, 1864, art. 9, p. 955; Italy, 1871, art. 3, p. 970; Japan, 1894, art. 1, p. 1029; Mexico, 1831-1881, art. 9, p. 1088; Paraguay, 1859, art. 11, p. 1367; Servia, 1881, art. 4, p. 1703; Tonga, art. 9, p. 783; Two Sicilies, 1855-1861, art. 5, p. 1816; Venezuela, 1860-1870, art. 2, p. 1846.

¹⁰Treaty of Washington, with Great Britain, 1871, art. 12, Malloy, p. 705. The commission provided allowed Great Britain \$1,929,819 for injuries to British subjects during the Civil war. See note Malloy, p. 705. Treaty with France, 1880, Malloy, p. 535. France was awarded \$625,566.35 for injuries to her subjects during the Civil war. Malloy, p. 539.

¹¹Moore's Digest, 6;883-926

¹²Moore's Digest, 6;918-922.

¹³Moore's Digest, 6;883-894.

Lieber's instructions.¹⁴ Military commissions undoubtedly have a jurisdiction to punish acts forbidden by the treaties mentioned, but the protection of resident neutrals during war is largely left within the discretion of the president as commander in chief of the army, and subordinate military authorities with delegated powers.

(3) As the actual enforcement of the state's duties of prevention in relation to the army depends upon the method of control exercised, some attention may be given to this point.¹⁵ The discipline of the army is to a large extent governed by formal rules, but these rules are to a considerable extent enforced by the discretionary authority of high military officers. In the field covered by constitutionally enacted congressional statutes, the army is bound beyond the authority of any executive or military officer to transcend, but in matters relating purely to the conduct of war it is doubtful whether congress has the power to control the army by statute.¹⁶

This does not, however, mean that the army is unregulated by law. It has a system of law of its own, known as military law, administered by its own officers and courts. The president as commander in chief has complete discretion as to the movements of the army except so far as limited by the constitution and acts of congress within the competence of that body.¹⁷ While the president's authority is discretionary and may be altered at will, as a matter of fact it is exercised by means of more or less permanent regulations and instructions issued as general orders. These regulations have the force of law while operative,¹⁸ and, together with statutes and constitutional provisions, their interpretations found in judicial decisions and

¹⁴Lieber's Instructions, art. 38, Military Laws, 1911, p. 1079.

¹⁵The statutory laws relating to the control of the army, annotated with references to court decisions and opinions of attorneys general and judge advocates general, may be found in *The Military Laws of the United States*, 1901, ed. by G. B. Davis, with a supplement to 1911, ed. by J. B. Porter. The *Digest of Opinions of the Judge Advocates General of the Army*, published in 1912, also contains references to statutes, cases and opinions of attorneys general bearing on the various points.

¹⁶On the independence of the president see *Military Laws*, 1911, p. 5 and notes. See *Kendall vs. U. S.* 12 Pet. 524, 610; *Marbury vs. Madison*, 1 Cranch 137, 166.

¹⁷*Military Laws*, 1911, p. 5, note 2.

¹⁸*U. S. vs. Barrows*, Fed. Cas. 14,529; *Dig. of Op. of Judge Ad. Gen.*, 1912, p. 681.

opinions of attorneys general and judge advocates general form the body of military law.

Military law is enforced by executive action,¹⁹ as in the power of promotion, demotion and discharge exercisable by superior military officers; by courts martial,²⁰ whose jurisdiction is defined by statute and extends only over statutory military offences, most of which are included in the Articles of War;²¹ and by military commissions.²² Military commissions administer military law by a procedure similar to courts martial, but they are not limited to the punishment of statutory offenses. They may take cognizance of acts contrary to the unwritten law of war or to military regulations.

The jurisdiction of both courts martial and military commissions is of an exclusively criminal character.²³ They decree punishments but do not award damages or reparation of any kind. Their jurisdiction, however, is not territorial.²⁴ It extends over offenses committed in foreign countries.

The statutory provisions, known as the Articles of War,²⁵ largely prescribe duties of enlisted men and officers²⁶ in relation to their military superiors and the performance of their military duties. Their aim is to enforce discipline in the army and they contain little matter referring to the law of war. Courts martial, being limited in jurisdiction to these offenses, cannot take cognizance of breaches of the unwritten law of war, including breaches of the army's obligations to neutral states and persons. The enforcement of these matters is in the hands of military commissions and their jurisdiction in time of war extends to

¹⁹Military Laws, 1911, p. 5, note 2.

²⁰Digest of Op. of Judge Ad. Gen., 1912, pp. 510-513.

²¹Rev. Stat., sec. 1342-1343; Military Laws, 1911, pp. 962-1026. For historical account of development of articles of war; Military laws, 1911, p. 962.

²²For history of development of military commissions see Dig. of Op. of Judge Ad. Gen. 1912, p. 1067. Use during Civil War, Ibid. p. 1071. Authority of, see Rev. Stat. 1343. Military Laws, 1911, p. 744, note 1, p. 745; Lieber's Instructions, art. 13, Military Laws, 1911, p. 1076; Dig. Op. Judge Ad. Gen., 1912, pp. 1067-1072.

²³Dig. Op. Judge Ad. Gen., 1912, pp. 510, 1072.

²⁴Dig. Op. Judge Ad. Gen., 1912, pp. 511, 1071.

²⁵Rev. stat. sec. 1342-1343, Military Laws, 1911, pp. 962-1026.

²⁶An exception may be noted in the jurisdiction given to courts martial over enemy spies, Rev. Stat. sec. 1343, Military Laws, 1911, p. 1026.

offenses committed by enlisted men or officers, civilians or enemies, contrary to military law or the law of war.²⁷

It is therefore by executive action and the adjudication of military commissions that the duties of the army toward neutrals are enforced. The provisions of the treaties mentioned, and the general requirements of international law, as well as the rules specified in army regulations and instructions may be enforced by these authorities.

ACTS BY NAVAL FORCES

The naval forces of a belligerent are much more likely to infringe the rights of neutral states than land forces. With them therefore the duty of preventing such infractions has received more attention in the municipal law of the United States.

(1) By the Hague conventions²⁸ the United States has recognized the obligation to prevent its naval forces violating neutral territory by committing hostilities or setting up prize courts in neutral waters, using neutral territory as a base of operations or violating the usual rules of asylum.

As in the case of the army the action of naval commanders is largely regulated by executive control. There are, however, statutes dealing with the navy. The "Articles for the Government of the Navy of the United States"²⁹ specify certain acts as crimes and subject to the jurisdiction of courts martial. The only authority capable of inflicting punishment in the navy is commanders,³⁰ for minor offenses, and for more serious offenses, summary and general courts martial.³¹ There are no courts in the navy similar to military commissions.

²⁷On the distinction between the jurisdiction of military commissions and courts martial, see Lieber's Instructions, art. 13, Military Laws, 1911, p. 1076.

²⁸Hague Conventions, 1907, xiii, art. 1, 4, 5, 12, 15-23. In thirty-two treaties with twenty-five countries the United States has been given the right of asylum for its war vessels in neutral ports, when necessary through "stress of weather, pursuit of pirates or enemies." The following are now in force: Bolivia, 1858, art. 9, Malloy, p. 117; Prussia, 1799-1810, revived 1828, art. 18, 19, p. 1492; Sweden, 1783-1798, revived 1816, 1827, art. 21, p. 1732. Such action does not constitute a violation of neutral territory even in the absence of treaty. Moore's Digest, 7:982-985.

²⁹Rev. Stat. sec. 1624; Navy Regulations 1913, p. 15.

³⁰Rev. Stat. sec. 1624, art. 24.

³¹Rev. Stat. sec. 1624, art. 22, 26, 38.

In addition to statutory provisions, the navy is governed by bodies of rules known as navy regulations and naval instructions which are promulgated by the president and have the force of law until repealed.³²

No statutory provisions deal with violations of neutral territory, but regulations and instructions,³³ since the Revolutionary war, have enjoined officers to respect neutral rights and especially to refrain from hostilities in neutral territory. Thus by the Navy Regulations of 1913 commanders in chief are to "scrupulously respect the territorial authority of foreign civilized nations in amity with the United States."³⁴

(2) The duty of preventing its naval forces injuring neutral individuals involves largely restraints which such forces are bound to observe in exercising the belligerent right of seizing neutral prizes on the high seas. The law applied by courts in enforcing the government's duty to abstain from illegally confiscating neutral prizes has been considered. Here we will consider the methods by which naval forces are prevented from making such seizures, or otherwise injuring neutral persons.

It must be observed that the acts prohibited in performing these duties of prevention and abstention are not exactly the same. The belligerent must prevent a *prima facie* unjustifiable seizure, but even when the seizure is justifiable the government may be bound to abstain from confiscating the prize. Thus it

³²Regulations for the government of the Navy of the United States, Washington, 1913, under authority of Rev. Stat., sec. 1547.

³³Naval Instructions, Apr. 3, 1776, Apr. 7, 1781, (Journ. Cong., Ford, ed., 4;253, 19;361); Aug. 28, 1812, (2 Wheat. App. 80, Moore's Digest, 7;545. Authority for the issuance of these orders was given in the prize act of 1812, 2 stat. 760, sec. 8. They were upheld in the *Thomas Gibbons*, 8 Cranch 421, (1814), but in the *Mary and Susan*, 1 Wheat. 46, 57, (1816) it was held that the captor must be notified of the order before his right to prize money from vessels, captured contrary to them, would be affected); May 14, 1846, (Br. and For. St. Pap., 34;1139, Moore's Digest, 7;828); Dec. 24, 1846, (Moore's Digest, 7;790); Nov. 6, 1861; May 14, 1862, (Upton, op. cit. p. 490); Aug. 18, 1862, (Official Records, Union and Confederate Navies, Ser. 1, 1;417, Moore's Digest, 7;700); June 20, 1898, (Gen. Ord., Navy Dept., 1898, No. 492, For. Rel., 1898, p. 780); Jan. 27, 1900, (Gen. Ord., Navy Dept., 1900, No. 551, revoked, *Ibid.*, Feb. 4, 1904, No. 150); Navy Regulations, 1913, sec. 1645, 1647.

³⁴Navy Regulations, 1913, sec. 1645. Naval commanders are allowed some discretion under these rules. See note at head of chapter 15. Navy Regulations, 1913, p. 159r.

frequently happens that a naval officer will be held completely justified in making a seizure even though the prize after adjudication is restored to the neutral owner.³⁵

It might be supposed that the means adopted to prevent illegal seizure of neutral property at sea would be a matter of purely national concern and would not be specified by international law. This is not the case. The exercise of belligerent rights over neutral commerce is so important and so subject to abuse that international law has to some extent specified the exact means which a state must provide for carrying out this obligation. Thus, it forbids captures by privateers, requires certain specified formalities of visit and search, and demands adjudication of the prize by a court acting in the usual form of judicial bodies. The belligerent state is of course at liberty to enact supplementary laws better to fulfill its duties under this head. Among such acts in force in the United States may be mentioned the statutes abolishing prize money, and those affixing criminal penalties for the spoliation of prizes. Before the abolition of privateering the requirement of bonds from privateers and the enforcement of liability against the owners of privateers were rules of this character. The abolition of privateering and the attempted abolition of prize money at the Second Hague conference are illustrations of the tendency of international law to enter more and more this field, formerly left to the discretion of states.

The United States has taken measures to prevent the illegal seizure of prizes by restricting the classes of vessels which may make seizures, by prescribing rules for visit and search of neutral vessels, and by affixing penalties for making unjustifiable seizures. An improper treatment of prizes and their crews is also prevented by municipal law. Definite rules for the conduct of prizes have been prescribed. Criminal penalties enforceable by court martial proceedings against persons in the navy violating these rules, as well as liability to civil suit for damages, add sanctions to their enforcement. Adjudication of prizes has also been provided for by the establishment of courts of prize jurisdiction. These matters will be considered in greater detail in the following sections dealing with the seizure of prizes, the care and treatment of prizes and the adjudication of prizes.

³⁵The *Marianna Flora*, 11 Wheat. 1, (1826).

SEIZURE OF PRIZES

The United States has authorized seizures during war by three varieties of vessels, (1) privateers, (2) converted merchantment, (3) vessels of the navy.

(1) The use of privateers or private armed vessels in war was prohibited by the Declaration of Paris of 1856. The United States has not acceded to this declaration,³⁶ but refrained from using privateers during the Civil war,³⁷ and by proclamation at the outbreak of the Spanish war of 1898 disclaimed intention to use them during that war.³⁸ Privateers have not been extensively used since 1856 and it may safely be said that their use is now forbidden by international law.

The United States made free use of privateers in the Revolutionary war and the War of 1812. On these occasions efforts were made to prevent illegal seizures through rules of municipal law expressed in treaties, statutes, naval instructions and court decisions. Privateers were provided with commissions or letters of marque accompanied by special instructions stating the scope and limits of their right to seize property.³⁹ These commissions

³⁶The United States did not accede to the Declaration of Paris because not having a navy it considered this type of naval militia necessary until the right to capture private property at sea should be abolished altogether. This complete exemption has been a tradition of American policy since earliest times. In a treaty with Bolivia, of 1858, it was reciprocally agreed to give asylum to privateers until the two parties should relinquish their use, "in consideration of the general relinquishment of the right of capture of private property upon the high seas," art. 9, *Mal. loy*, p. 117.

³⁷On proposals to issue letters of marque during the Civil War and reasons for not doing so, see *Moore's Digest*, 7:556. An act of March 3, 1863, 12 stat. 758, gave the president authority to issue letters of marque.

³⁸Proclamation, Apr. 26, 1898, 30 stat. 1770; *Moore's Digest*, 7:541.

³⁹Privateers were authorized by a resolution of the Continental congress, March 23, 1776. On April 2 and 3, forms of commission were adopted to be sent in blank to the colonies. About 1700 letters of marque were issued during the Revolutionary war. See Allen, *Naval History of the American Revolution*, 1:451; 2:701. During the War of 1812, privateers were of great importance. In the Civil war the Confederate states issued letters of marque and an act of Mch. 3, 1863, authorized their issuance by the federal government. Regulations and instructions were drawn up on Mch. 20, 1863, but as a matter of policy no commissions were issued. See *Moore's Digest*, 7:556. See Resolutions of Congress, Mch. 23, 1776, Instructions Apr. 3, 1776, Apr. 17, 181, (*Journ. Cong.*, Ford, ed., 4:230, 253, 19:361); Instructions, Aug. 28, 1812, (2 *Wheat. App.* 80) (*Moore's Digest*, 7:544). On necessity of carrying commissions see Upton, *op. cit.* p. 177.

could be declared forfeited at the discretion of the president.⁴⁰ By treaties⁴¹ and statutes⁴² privateers were required to furnish bond or other security for good behavior. An act of 1812⁴³ required privateers to keep a journal which was to be inspected by the commanders of naval vessels meeting the privateer at sea, prohibited cruising without special instructions, and declared prize money forfeited in case of illegal seizures. Courts have held the owners of privateers responsible for the conduct of the officers and crew of the vessel to the full value of property injured or destroyed.⁴⁴

It should be noted, however, that an illegal act done by a privateer would not operate to invalidate the captures so far as the United States government was concerned. The captor might forfeit his prize money, bond and commission, but if the vessel were declared good prize by the court, the neutral owner would have no recourse. Thus a non-commissioned vessel,⁴⁵ or a vessel manned by a neutral or even an enemy crew⁴⁶ might make a capture, valid as against the belligerent or neutral owner, although the officers, crew and owners themselves might be subject to criminal punishment or civil liability.

(2) The use of converted merchant vessels in war was provided for in the mail subsidy act of 1891,⁴⁷ and a number of vessels of this character were used during the Spanish war.

⁴⁰Act June 26, 1812, 2 stat. 760. See Upton, *Op. cit.*, p. 181, 185; The Thomas Gibbons, 8 Cranch 421.

⁴¹Treaties with Great Britain, 1794-1807, art. 19, Malloy, p. 602; France, 1800-1809, art. 23, p. 504; Netherlands, 1782-1795, art. 14, p. 1238; Prussia, 1785-1796, art. 15, p. 1482; Sweden, 1783-1798, revived treaty of 1827, art. 16, p. 1730.

⁴²Act July 9, 1798, 1 stat. 578; June 26, 1812, 2 stat. 760.

⁴³Act June 26, 1812, 2 stat. 760; Instructions to privateers, Aug. 28, 1812, 2 Wheat. App. 80, Moore's Digest, 7:544.

⁴⁴*Del Col vs. Arnold*, 3 Dall. 333, (1796). The liability of the owners was held to extend only to acts committed by the officers and crew in making captures in *Davis vs. The Revenge*, 3 Wash. 262. For acts done not in pursuance of the commission the owner was held not liable, see *The Amiable Nancy*, 1 Paine 11.

⁴⁵*The Joseph*, 1 Gall. 545, Upton, *op. cit.* 178.

⁴⁶*The Mary and Susan*, 1 Wheat. 46.

⁴⁷Act March 3, 1891, 26 stat. 830, sec. 9. See also act July 17, 1862, 12 stat. 600, sec. 8, for recognition of "armed vessels in the service of the United States" distinct from either privateers or vessels of the navy, and *The Rita*, 69 Fed. Rep. 763. Moore's Digest, 7:538-543.

One of the Hague conventions of 1907⁴⁸ contains regulations for the use of such vessels, but it was not signed or ratified by the United States. The United States has always put converted merchantmen under the command of regular naval officers and subjected their crews to naval discipline. The measures taken to prevent violation of the rights of neutral persons by regular naval forces are therefore applicable to them.

(3) In a number of its early treaties the United States put itself under the obligation to prevent warships exercising the right of visit and search over vessels under neutral convoy,⁴⁹ or the right of search over vessels bearing a passport or sea letter of their country when neutral.⁵⁰ Specific requirements for conducting visit and search⁵¹ were often included in these treaties and the right of action for damages received by the neutral individual from a United States warship or privateer⁵² was frequently granted. The treaty requirement of bonds, ensuring the good behavior of privateers, has already been mentioned.⁵³

According to the declaration of London vessels under neutral convoy are exempt from visit and search.⁵⁴ Illegal seizures are guarded against by the provision entitling the owner to compensation if his vessel was seized without sufficient reason and was subsequently released.

⁴⁸Hague Conventions, 1907, vii.

⁴⁹Respect for neutral convoy has been required in twenty-four treaties with nineteen countries, of which the following are in force: Bolivia, 1858, art. 23, p. 309; Colombia, 1846, art. 23, p. 309; Italy, 1871, art. 19, p. 975; Sweden, 1783-1798, revived 1816, 1827, art. 12, p. 1729.

⁵⁰In most of the early treaties the carriage of sea letters was provided for in terms similar to that of the French treaty of 1778-1798, art. 24, 27, Malloy, pp. 477, 478. In some of them the carriage of such a passport was mandatory; a failure to produce it if not explained would result in condemnation as constructive enemy property. *Supra*, p. 161.

⁵¹As examples of treaty provisions prescribing method of conducting visit and search see treaties with Prussia, 1785-1796, art. 15, p. 1482; 1799-1810, art. 15, p. 1491; Sweden, 1783-1798, revived treaties 1816, 1827, art. 25, p. 1733.

⁵²Treaties with France, 1778-1798, art. 15, p. 474; 1800-1809, art. 19, p. 504; Netherlands, 1782-1795, art. 13, p. 1237; Prussia, 1785-1796, art. 15, p. 1482; Sweden, 1783-1798, revived 1816, 1827, art. 15, p. 1730.

⁵³*Supra*, p. 181, note 41.

⁵⁴Declaration of London, 1909, art. 61, 64. On the status of the Declaration of London in 1914, see *Am. Jour. Int. Law*, 9:199, Jan. 1915.

In instructions issued to war vessels upon the outbreak of wars,⁵⁵ and in general naval regulations⁵⁶ and instructions,⁵⁷ methods of conducting visit and search and other duties of naval vessels toward neutral persons, required by treaty and international law, have been specifically enjoined.

The courts have held that the making of seizures without probable cause or proper authorization by law even when done under specific order of the president, as commander in chief of the navy, renders the captor liable to damages.⁵⁸ A seizure in violation of international law, however, when specifically authorized by municipal law, is permissible so far as the captor is concerned.⁵⁹ The only recourse in such cases is through diplomatic protest.

CARE AND TREATMENT OF PRIZES

A prize having been seized, five courses are open to the captor, (1) bringing in to home port for adjudication, (2) destruction, (3) ransom, (4) sequestration in a neutral port or sale in neutral territory, (5) release. The treatment which a neutral state has a right to expect under international law and the measures which the United States has taken to prevent its naval forces infringing those rights will now be considered.

(1) A number of early treaties⁶⁰ required the preservation of prizes intact until adjudication by a prize court, and the hospitable treatment of the officers and crew.

The Declaration of London⁶¹ requires prizes to be brought to port for adjudication and forbids the destruction of either vessel

⁵⁵Naval Instructions, Apr. 3, 1776, (Jour. Cong., Ford, ed., 4;253); Apr. 7, 1781, (Jour. Cong., Ford, ed., 19;361); Aug. 28, 1812, (2 Wheat. App. 80, Moore's Digest, 7;544); 1813, Special Instructions, (Am. St. Pap., Nav. Aff., 1;373, Moore's Digest, 7;516); May 14, 1846, (Br. and For. St. Pap., 34;1139); Dec. 24, 1846, (Moore's Digest, 7;790); May 14, 1862, (Upton, op. cit., p. 490); Aug. 18, 1862, (Rec. Union and Conf. Navies, Ser. I, 1;417, Moore's Digest, 7;700); June 20, 1898, (For. Rel., 1898, p. 780).

⁵⁶Navy Regulations, 1913, sec. 1634.

⁵⁷Stockton's Naval War Code, 1900-1904, art. 30, 32, 33.

⁵⁸Little vs. Barreme, 2 Cranch 170, (1804); The Thompson, 3 Wall. 155; The Dashing Wave, 5 Wall. 170; see also Moore's Digest, 7;593-598.

⁵⁹La Maissonaire vs. Keating, 2 Gall. 334. See Upton, op. cit., p. 189.

⁶⁰As an example see treaty with France, 1800-1809, art. 20, 21, Malloy, p. 503.

⁶¹Declaration of London, 1909, art. 48-54.

or cargo, unless the prize would be liable to condemnation and an attempt to bring it in for adjudication "would involve danger to the ship of war or to the success of the operation in which she is at the time engaged." If the prize is destroyed, persons on board and the ship's papers must be saved and the captor is declared liable to pay compensation if he cannot prove the existence of circumstances justifying destruction, irrespective of the validity of the capture. A decree of restitution of the vessel or part of its cargo in such a case involves compensation.

By the articles for the government of the navy,⁶² punishment by death or other sentence of court martial is authorized to anyone destroying or injuring prizes or maltreating persons on board of them, and in the instructions for the navy issued on the outbreak of war, as well as in permanent instructions, rules for the care of prizes and their crew have generally been specified and their prompt bringing in required.⁶³

The courts have declared that it is the captor's duty to bring prizes in for adjudication as soon as possible⁶⁴ and to deliver papers and necessary witnesses to the court.⁶⁵ Failure to perform these duties will result in damages to the neutral owner but it is only for "gross misconduct without excuse or palliation" that they may be had. "Much indulgence is extended to errors and even improprieties of captors when no malignity or cruelty is justly chargeable."⁶⁶

(2) Special instructions to privateers and warships in the war of 1812⁶⁷ particularly advised destruction of prizes and this

⁶²Resolution, Nov. 25, 1775, Journ. Cong., Ford, ed., 3:373; Act, Apr. 23, 1800, 2 stat. 52; July 17, 1862, 12 stat. 600; Rev. Stat. sec. 1624, art. 6, 11, 12. See other statutory provisions relating to the administration of prizes, Act, March 3, 1800, 1 stat. 16; June 26, 1812, 2 stat. 760; June 27, 1813, 2 stat. 793; March 25, 1862, 12 stat. 375; March 3, 1863, 12 stat. 759; June 30, 1864, 13 stat. 306; Rev. stat. sec. 4615-4617.

⁶³Stockton's Naval War Code, 1900-1904, sec. 46, 47. Supra, note 57.

⁶⁴The Lively, 1 Gall. 318; The Nassau, 4 Wall. 634; Moore's Digest, 7:630.

⁶⁵The Diana, 2 Gall. 95; The Bothnea and the Jarnstoff, 2 Gall. 88.

⁶⁶See Upton, op. cit. p. 200, citing, The Lively and Cargo, 1 Gall. 29; The Anne, 3 Wheat. 435; The George, 1 Mason, 24. On liability of captor for damages, see also, Slocum vs. Mayberry, 2 Wheat. 1; The Apollon, 9 Wheat. 362; The Neustra Senora de Regla, 108 U. S. 92, 103, (1882), and Moore's Digest, 7:630. Declaration of London, 1909, art. 52, 53.

⁶⁷Special Instructions, 1813, Am. St. Pap., Navy Aff., 1:373; Moore's Digest, 7:516.

action was permitted by the instructions to blockading vessels in 1898,⁶⁸ and in Stockton's Naval War Code.⁶⁹ But in the last two cases bringing in was required unless there were "controlling reasons" for not doing so, such as "unseaworthiness, the existence of infectious diseases, lack of a prize crew," or imminent danger of recapture.

These provisions of statutes and executive orders indicate that the destruction of prizes is permitted under certain circumstances, but the practice has been discouraged except during the war of 1812. In discussions of the subject in the Naval War College in 1905 and 1907 the release of neutral prizes which could not be brought into port was recommended.⁷⁰

(3) Ransom or the release of the prize by the captor on signature of a ransom bill generally accompanied by a hostage to insure payment is permitted by law in the United States. The

⁶⁸Instructions to Blockading Vessels and Cruisers, June 20, 1898, For. Rel. 1898, p. 780, Moore's Digest, 7;518.

⁶⁹Stockton's Naval War Code, art. 50; Moore's Digest, 7;526.

⁷⁰Naval War College, International Law Discussions, 1905, pp. 62-76; 1907, p. 75. In these discussions a distinction is drawn between the destruction of neutral and enemy prizes, the former being forbidden. See also T. E. Holland, Neutral Duties in Maritime War, Proceedings British Academy, 2;12, quoted Moore's Digest, 7;521. International opinion generally condemns the destruction of neutral prizes and British courts have upheld this view. See *The Zee Star*, 4 Rob. 71; *The Felicity*, 2 Dods. 283; *The Leucade*, Spinks 221; W. E. Hall, International Law, 4th ed., p. 763; T. J. Lawrence, International Law, p. 405; L. Oppenheim, International Law, 2;469. Russian prize regulations of March 27, 1895, and Sept. 20, 1900, (For. Rel., 1904, pp. 735, 747, 752, Moore's Digest, 7;519) permitted destruction. A notable controversy arose from the destruction of the British vessel *Knight Commander* under these regulations in the Russo-Japanese War. The Russian prize court upheld this act. (Hurst and Bray, Russian and Japanese Prize Cases, 2 vol., London, 1912, 1;54; S. Takahashi, International Law applied to the Russo-Japanese War, N. Y. 1908, p. 310; Moore's Digest, 7;521). Destruction was permitted in exceptional cases by the Japanese Prize Regulations of March 15, 1904, art. 91 (Takahashi, op. cit. p. 788) and by the French Naval Instructions of July 25, 1870, (Snow cases, p. 577), and in certain cases of pressing necessity in the rules adopted by the Institute de Droit International. (*Annuaire de l'institut de droit international*, 6;213, 221, 1882-1883, Moore's Digest, 7;526). The recent (1915) case of the *William P. Frye*, an American vessel destroyed by a German cruiser, was settled under the Prussian treaty of 1799, renewed in 1828, (art. 13, Malloy, p. 1490) which requires compensation to be made for all contraband goods destroyed.

prize money act of 1862⁷¹ provided for the division of ransom money in the same manner as prize money, and in the case of *Goodrich vs. Gordon*⁷² in the supreme court of New York, ransom bills were held to be good contracts enforceable in court.

(4) The sequestration and sale of prizes in neutral ports are practices which the United States as a neutral permitted France in the wars following the French Revolution.⁷³ Since that time the United States has opposed such practices, although according to treaties⁷⁴ and international law⁷⁵ it has permitted the temporary asylum of belligerent warships and their prizes.

In the Hague conventions of 1907⁷⁶ special provision was made for the sequestration of prizes in neutral ports pending adjudication in the belligerent's prize court, apparently with the hope of somewhat limiting the necessity of destroying prizes at sea. The United States did not ratify this section, thus maintaining its opposition to the principle of sequestration of prizes, which the American delegation spoke of as an "ancient abuse."⁷⁷ The Naval War College in a discussion of the subject in 1908⁷⁸ recommended against sequestration. Nevertheless the United States has resorted to sequestration in wars in which she has been a belligerent, and the courts have not hesitated to uphold their jurisdiction over prizes in neutral ports,⁷⁹ as well as over prizes

⁷¹Act, July 17, 1862, 12 stat. 600.

⁷²*Goodrich vs. Gordon*, 15 Johns, 6, (1818) N. Y.

⁷³Moore's Digest, 7:935-938.

⁷⁴Treaties with France, 1778-1798, art. 17, Malloy, p. 474; 1800-1809, art. 24, p. 504; Great Britain, 1794-1807, art. 25, p. 604; Prussia, 1785-1796, art. 19, p. 1483; 1799-1810, revived 1828, p. 1493; Sweden, 1783-1799, revived 1816, 1827, art. 17, 19, p. 1732; Tripoli, 1805, art. 17, p. 1792; Algiers, 1795-1815, art. 10, p. 3; 1815-1830, art. 18, p. 8; Netherlands, 1782-1795, art. 5, p. 1245.

⁷⁵Att. Gen. Cushing, 7 op. 122, (1855), Moore's Digest, 7:982-985. This applies at least to war vessels and their prizes. The privilege was often denied to privateers. See Cushing, 7 op. 122, (1855), Moore's Digest, 7:546. For opinion during the Revolutionary war see Allen, *Naval History of the American Revolution*, 1:255-257, 274; 2:537-538.

⁷⁶Hague Conventions, 1907, xiii, art. 23.

⁷⁷Report of United States Delegation, see *Naval War College, International Law Situations*, 1908, p. 76.

⁷⁸*Naval War College, International Law Situations*, 1908, pp. 58-78.

⁷⁹*Jecker vs. Montgomery*, 13 How. 512; *The Arabella and The Madeira*, 2 Gall. 368; *Hudson vs. Guestier*, 4 Cranch 293; *Naval War College, International Law Situations*, 1908, pp. 60-62.

which had been sold⁸⁰ or destroyed.⁸¹ The sequestration of prizes in neutral ports seems to be permitted to naval vessels by law of the United States, although not looked upon with favor.

(5) Release of neutral prizes in preference to destruction was recommended by the naval war college in a discussion of 1907,⁸² but this course would probably not be pursued except as a last resort.

The permission to accept ransom and sequester vessels in neutral ports, together with the strict injunction to bring prizes in for adjudication if possible, tends to prevent injury to neutral owners. The permission to destroy prizes, however, would have an opposite effect. The criminal penalties provided for illegal treatment of prizes as well as the rule giving action for damages in such cases are also measures directed toward the duties of prevention incumbent upon the country.

ADJUDICATION OF PRIZES

One of the most important measures taken by the United States to prevent infractions of neutral rights by its naval forces, is the establishment of prize courts with jurisdiction over all seizures by naval vessels. This means of prevention is regarded as so essential that it has become a rule of international law. The establishment of prize courts and the adjudication of prizes are duties which international law requires of belligerent states.

(1) In a large number of its treaties⁸³ the United States has reciprocally agreed as a belligerent to adjudicate prizes seized from the other contracting party, when neutral, in its prize court,

⁸⁰Williams vs. Amroyd, 7 Cranch 423.

⁸¹The *Edward Barnard*, Blatch. 122; The *Schooner Zavalla*, Blatch. 173. See *Naval War Col., Int. Law Sit.*, 1908, p. 63.

⁸²Naval War College, *International Law Discussions*, 1907, p. 75. Release, where the prize can not be brought in for adjudication, is recommended by Lawrence, *op. cit.*, p. 405; Hall, *op. cit.*, p. 763. British courts have favored this rule in dicta, see *The Zee Star*, 4 Rob. 71; *The Felicity*, 2 Dods. 381; *The Leucade*, Spinks, 221, Bentwich 157, Moore's Digest, 7:522. Release of neutral prizes in certain cases was prescribed in the Japanese prize law of 1894, (art. 20, 22), but destruction was permitted in similar cases by the law of 1904, art. 91. See S. Takahashi, *International Law applied to the Russo-Japanese War*, New York, 1908, pp. 333-788, Moore's Digest, 7:525.

⁸³Adjudication of prizes has been required in twenty treaties with fourteen countries, of which those with Bolivia (1858, art. 24, Malloy, p. 121) and Colombia (1846, art. 24, p. 309) are in force.

and to furnish a written statement of the reason for condemnation, on request. Statutes,⁸⁴ instructions to naval forces⁸⁵ and numerous decisions of prize courts⁸⁶ have also insisted on the necessity of a legal adjudication of prizes before passage of title or complete ousting of the right of the original neutral owner.

The United States has also recognized the duty of observing certain limitations in the establishment of its prize courts. Although France established prize courts in territory of the United States in the wars following the French revolution, the United States⁸⁷ never acknowledged its right to do so, and in the Hague conventions of 1907⁸⁸ it was provided that prize courts should not be set up on neutral territory or on a vessel in neutral waters. The courts have held that prize courts may be established in the country's jurisdiction or in occupied enemy territory.⁸⁹

(2) The power to establish a prize court of appeal was given to congress in the Articles of Confederation and also the power to "establish rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated." The court, consisting of a committee of congress established under this authority by the continental congress,⁹⁰ had simply appellate jurisdiction over state courts

⁸⁴Rev. Stat. sec. 4615-4617.

⁸⁵Instructions, June 20, 1898, art. 20-23, For. Rel. 1898, p. 781; Moore's Digest, 7;514; Stockton's Naval War Code, 1900-1904, art. 46-50.

⁸⁶The *Dos Hermanos*, 2 Wheat. 76; The *Pizarro*, 2 Wheat. 227; The *Adventure*, 8 Cranch 221, (1814); Grundy Att. Gen., 3 op. 377, (1838), The *Nassau*, 4 Wall, 634; Moore's Digest, 7;623-631.

⁸⁷See Fenwick, *The Neutrality Laws of the United States*, p. 18. At the time of the Revolutionary war it was common to take prizes into neutral ports where they were adjudicated by the local courts of admiralty, although it was even then regarded as an act approaching a breach of neutral duty. The United States on several occasions took prizes into French and Spanish ports. See G. W. Allen, *A Naval History of the American Revolution*, N. Y., 1913, 1;255,274; 2;537,538.

⁸⁸Hague Conventions, 1907, xiii, art. 4, Malloy, p. 2359.

⁸⁹The *Grapeshot*, 9 Wall. 129. The authority of the president as commander in chief to establish prize courts in conquered territory was upheld in the *Grapeshot* but denied in *Jecker vs. Montgomery*, 13 How. 498, which held that Congress alone could create courts with a prize jurisdiction. See Moore's Digest, 7;585.

⁹⁰Articles of Confederation, art.. 9; Resolution of Nov. 25, 1775, sec. 6, Jour. Cong. 1:242, Ford. ed. 3;373. See note on these courts with references, Scott 10..

of admiralty, the establishment of which with a prize jurisdiction was recommended to the colonial legislatures by a resolution of congress.⁹¹

By the constitution the judicial power of the United States is declared to extend over "all cases of admiralty and maritime jurisdiction." By the judiciary act of 1789 the jurisdiction of the federal courts over prizes has been made exclusive,⁹² thereby barring any possible jurisdiction in state courts, and original jurisdiction in prize causes has been given exclusively to federal district courts,⁹³ thus limiting higher federal courts including the supreme court to appellate jurisdiction in such cases. The prize jurisdiction of district courts is complete, including all matters relating to the disposition of vessels seized *jure belli*, or by authority of statutes such as embargo, non-intercourse and revenue acts. The admiralty jurisdiction, both instance and prize, exists constantly, and no specific commission on the outbreak of war is necessary for the exercise of prize jurisdiction;⁹⁴ thus when the

⁹¹Resolution of Nov. 25, 1775, sec. 4-6, Jour. Cong. 1:242, Ford. ed. 3:373. See Moore's Digest, 7:585. Before the passage of this resolution, on Nov. 1, 1775, the general court of Massachusetts had established prize courts, the first ever erected by an independent state in the western hemisphere. See Acts and Resolutions of Province of Massachusetts Bay, 1886, 5:436.

⁹²Act. Sept. 24, 1789, 1 stat. 76, sec. 9; rev. stat., sec. 711, cl. 3, 4; Judicial code, 1911, act March 3, 1911, 36 stat. 1087, sec. 256, cl. 4. The admiralty jurisdiction of which prize jurisdiction is a part was held to be exclusive in federal courts in *The Hine vs. Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 625.

⁹³Act Sept. 24, 1789, 1 stat. 76, sec. 9; rev. stat., sec. 563, cl. 8; Judicial code of 1911, 36 stat. 1087, sec. 24, cl. 3. See *Ketland vs. The Cassius*, 2 Dall. 365, (1796).

⁹⁴Prize jurisdiction may have been originally inherent in courts of admiralty in England, but it was quite early recognized as distinct from the instance jurisdiction and as exercisable only under special commission, see *Lindo vs. Rodney*, 2 Doug. 614, (1781) W. S. Holdsworth, *A History of English Law*, 3 Vol., London, 1907, 1:330. By the naval prize act of 1864, (27-28 Vict. c. 25, sec. 4) a permanent prize jurisdiction was given to the High Court of admiralty, which was vested in the High Court by the Judicature act of 1873, (36-37 Vict. c. 66, sec. 4-18). By the Prize courts act of 1894, (57-58 Vict. c. 39), commissions giving a prize jurisdiction to vice-admiralty courts might be issued in time of peace to become effective by the outbreak of war. See, *The Earl of Halsbury*, ed., *The Laws of England*, 27 vol., London, 1912, 23:285, Pitt Cobbett, *Cases and Opinions on International Law*, 3rd. ed., 2 vols., London, 1909, 2:190.

country is neutral the jurisdiction may be exercised over vessels violating neutrality, and in times of peace over vessels of pirates and unrecognized insurgents committing depredations against commerce.⁹⁵

(3) By the international prize court convention of the second Hague conference, ratification of which with an amending protocol was recommended by the senate on February 15, 1911,⁹⁶ the United States has consented to submit to the decision of the international prize court in certain prize cases arising in wars in which all of the belligerents are parties to the convention. By the protocol⁹⁷ proposed by the United States in 1910 on account of the constitutional impossibility of an appellate authority above the supreme court, it is provided that an original action for damages against the captors may be brought in the international prize court. Technically therefore in the case of the United States the international prize court would not have jurisdiction to determine the validity of the title to prizes, but the effect of the decision would be the same. The international prize court has not been established up to date.

The convention provides that in deciding cases the court is to be governed by treaties if any bear on the controversy, by international law if settled or in the absence of either by "general principles of justice and equity." On account of this somewhat vague description of the law to be applied the London Naval Conference of 1909 was called to draw up a code of prize law. Owing to the failure of the Declaration of London, proposed by this conference to secure general ratification, no immediate prospect of the establishment of the court is in view.⁹⁸ The firm establishment of such an international court would undoubtedly be a most potent agency for preventing injury to neutral persons by belligerent naval forces.

(4) Prize jurisdiction is ordinarily exclusive in the courts of the country of the capturing belligerent power.⁹⁹ It is essen-

⁹⁵Glass vs. The Betsey, 3 Dall. 6, (1794). Supra p. 33 et seq., 131 et seq.

⁹⁶Hague Conventions, 1907, xii, Charles, Treaties, 1913, p. 248.

⁹⁷Charles, Treaties, 1913, p. 262.

⁹⁸On the status of the Declaration of London in 1914 see Editorial comment, Am. Jour. Int. Law, 9; 199, Jan. 1915.

⁹⁹L'Invincible, 1 Wheat. 238, 261; The Estrella, 4 Wheat. 298; U. S. vs. Peters, 3 Dall. 121, (1795). In a number of treaties to which the United States is a party, it is provided that prizes of either party when belligerent shall be exempt from the jurisdiction of the other when tem-

tially a jurisdiction in rem, extending over seizures *jure belli* from neutrals or enemies upon the high seas or in territorial waters within the admiralty jurisdiction.¹⁰⁰ Actual possession of the vessel in question, however, is not necessary. The jurisdiction may be exercised over a vessel sequestered in a neutral port,¹⁰¹ sold,¹⁰² ransomed,¹⁰³ or sunk,¹⁰⁴ and according to law a decision must be given in all of these cases before the seizure and disposition of the prize can be regarded as legitimate. The ordinary case is where the vessel has been brought into port and has been put according to a provision of statute into the custody of an officer of the court.

Seizures of foreign vessels made in pursuance of local regulations such as the embargo and non-intercourse acts are legitimate only when made in the territorial jurisdiction of the United States, but subject to this limitation are treated in the same manner as prizes *jure belli*.¹⁰⁵ The same is true of vessels violating the neutrality of the United States. They also may only be seized in territorial waters.¹⁰⁶ The seizure of pirate vessels,¹⁰⁷ vessels of unrecognized insurgents committing depredations on commerce¹⁰⁸ and vessels engaged in acts internationally condemned, as the slave trade,¹⁰⁹ is permitted on the high seas porarily taken into its ports. *Supra*, p. 186, note 74. For exceptions to the exclusive jurisdiction of the captor power's courts over prizes see *Moore's Digest*, 7:592. *Supra*, p. 134 et seq.

¹⁰⁰*Schooner Adeline*, 9 Cranch 244, Speed, Att. Gen., 11 op. 445, (1866); Note on prize law, 1 Wheat. App. II; 2 Wheat. App. I; 5 Wheat. App. p. 52.

¹⁰¹*Jecker vs. Montgomery*, 13 How. 498; *The Advocate*, Blatch. 142; *The Arrabella and the Madiera*, 2 Gall. 368.

¹⁰²*Williams vs. Amroyd*, 7 Cranch 423, (1819).

¹⁰³*Maissonaire vs. Keating*, 2 Gall. 324, 337, (1815); *Miller vs. The Resolution*, 2 Dall. 1, 15, (1781). See *Moore's Digest*, 7:533.

¹⁰⁴*The Edward Barnard*, Blatch, 122; *The Schooner Zavalla*, Blatch, 173. See also *Moore's Digest*, 7:590.

¹⁰⁵*Rose vs. Himeley*, 4 Cranch, 241, (1808); *Gelston vs. Hoyt*, 3 Wheat. 246.

¹⁰⁶*The Estrella*, 4 Wheat. 298, (1819); *The Alerta*, 9 Cranch 359, (1815).

¹⁰⁷*The Ambrose Light*, 25 Fed. Rep. 408, (1885).

¹⁰⁸*The Three Friends*, 166 U. S. 1, (1897); *The Ambrose Light*, 25 Fed. Rep. 408. (1885).

¹⁰⁹General act for the Repression of the African Slave Trade, 1890, Malloy, p. 1964. In the *Antelope*, 10 Wheat. 66, 122, (1825) Chief Justice Marshall denied the legitimacy of seizures for slave trading beyond territorial jurisdiction in the absence of treaty.

by countries at peace and in such cases the United States courts exercise a prize jurisdiction. It should be noted that statutes may confer a jurisdiction over seizures on the high seas not recognized or permitted by international law, and the prize courts are bound to exercise it.¹¹⁰

In order to confer a prize jurisdiction the seizure must be on the high seas or in territorial waters within the admiralty jurisdiction. Seizures on land confer no prize jurisdiction in the United States.¹¹¹

Although prize jurisdiction is essentially a jurisdiction in rem, the duty of the court being to settle the title to the vessel itself and its cargo, yet it is not entirely so. Incidental to the disposition of the prize, claims for damages may arise, and it may be necessary to determine the rights of claimants for freight, liens, insurance, etc. All of these matters come within the jurisdiction of prize courts of the United States.¹¹²

(5) The functions of prize courts are (a) to determine upon the legality of seizures, (b) to determine the title to prizes and (c) to dispose of the proceeds in case of condemnation.

By their authority to decide whether the seizure was justifiable, and in case it was without probable cause to decree damages against the naval officers making it, prize courts may aid in the prevention of injury to neutral persons by such officers.

In determining the title to the prize, the court adjudicates the respective claims of the belligerent government to condemnation and the neutral owner to restitution. It thus enforces the duty of the government to abstain from illegal confiscation of neutral property. In disposing of the proceeds of condemned prizes the court may further prevent infractions of neutral rights by naval forces.

The law applied by prize courts of the United States in

¹¹⁰The *Amy Warwick*, 2 Sprague 123; *Murray vs. The Charming Betsey*, 2 Cranch 64; *Talbot vs. Seaman*, 1 Cranch 1; *Moore's Digest*, 2:914. In the absence of statute the jurisdiction of prize courts is determined by international law. The *Schooner Adeline*, 9 Cranch 244, *Moore's Digest*, 7:599. In reference to British claims to prize jurisdiction over extraterritorial seizures of foreign vessels in suppressing the slave trade see *supra* p. 35.

¹¹¹*Brown vs. U. S.*, 8 Cranch 110, (1814). In England prize courts were given jurisdiction over booty seized by land forces by statute in 1840, 3-4 Vict. c. 55, sec. 22; *Banda and Kirwee Booty*, L. R., 1 Adm. and Ecc., 109, (1866).

¹¹²*Moore's Digest*, 7:593-603, *Infra* p. 193, note 13.

decreeing distribution of the proceeds of prizes will now be considered.

(6) Claimants to proceeds of prizes may be of two kinds, (1) persons with equitable claims upon the vessel by contract or ordinary principles of the law of admiralty, such as claims for freight, liens, insurance, etc. The prize courts of the United States have in general recognized the validity of such claims upon neutral prizes and their jurisdiction over them; consequently in case of condemnation of the vessel, such claims have been commonly allowed before any part of the proceeds is decreed to the government.¹¹³ (2) Persons with claims for meritorious service in capturing the vessel. These claims may be of two kinds, (a) where the vessel is condemned to the capturing state, and (b) where a recaptured vessel is restored to its original neutral or citizen owner. In the first case the claim is for prize bounty or prize money, in the second for military salvage.

(a) It is a principle firmly established in Anglo-American jurisprudence, if not universal, that prizes legally condemned enure primarily to the government.¹¹⁴

¹¹³The *Societe*, 9 Cranch 209, 212, (1815); The *Antonia Johanna*, 1 Wheat. 159, (1816); *Schwartz vs. Insurance Co. of No. Am.* 3 Wash. C. C. 117. In the case of enemy prizes the opposite rule appears to prevail, that capture destroys all previous claims. See *The Hampton*, 5 Wall 372; *The Carlos F. Roses*, 177 U. S. 655; *The Frances*, 8 Cranch 418, (1814); See *Moore's Digest*, 7;600-603.

¹¹⁴This principle which is signified by the phrase, "*Bello parta cedunt republicae*," appears to have been recognized by the Greeks and Romans. "Whatever is captured from the enemy, the law directs to be public property, so that not only private persons are not the owners of it, but even the general is not. The questor takes it, sells it and carries the money to the public account." Cited from Dionysius of Halicarnassus by Grotius, *De Jure Belli ac Pacis*, (1625), Whewell, ed., 3 vols. Cambridge, 3;124. See also, A. S. Hershey, *The History of International Relations during Antiquity and the Middle Ages*, *Am. Jour. Int. Law*, 5;915, (1911); Coleman Philipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols., London, 1911, 2;237, 381. For opinion of Grotius on this subject, see op. cit., 3;105. For recognition of this principle in England in 1342 A. D., see Rymer, *Foedera*, 20 vol., London, 1704-1735, 1;408; Robert Phillimore, *Commentaries on International Law*, 3rd ed., 4 vols., London, 1885, 3;601; T. E. Holland, *Principles of Jurisprudence*, 11th ed., N. Y., 1910, p. 212; *Alexander vs. Duke of Wellington*, 2 Russ. and Mylne 54, (1831); *The Elsebe*, 5 Rob. 173, (1804); *Banda and Kirwee Booty*, L. R. 1 Adm. and Ecc. 109, (1866). Recognition of this principle

In the Revolutionary war, by resolution of congress,¹¹⁵ prizes were given to the captors entirely if privateers, and one-third to one-half if public vessels. By an act of 1800¹¹⁶ the whole of the proceeds of prizes captured by public vessels was decreed to the captor when of inferior force to the prize, and one-half the proceeds when of superior force. The act also provided for distribution among the vessels within sight as joint captors, and among the officers and men of the vessels. The whole of prize proceeds was given to privateers and by an act of 1812¹¹⁷ distribution was decreed to be according to contract between owners and crew or in the absence of contract one-half to each. The provisions of the act of 1800 were practically repeated in acts passed during the Civil war¹¹⁸ which applied

in the United States, *U. S. vs. The Schooner Peggy*, 1 Cranch 103; *The Siren*, 13 Wall. 389; *Porter vs. U. S.* 106 U. S. 607; *Commodore Stewart's case* 1, Ct. Cl. 113, *Scott*, 910; *The Nuestra Senora de Regla*, 108 U. S. 92, 101, (1882); *The Manila Prize Cases*, 188 U. S. 254. In the *Palmyra*, 12 Wheat. 1, the court held that all proceedings for condemnation upon captures should be in the name of the United States. Before the abolition of prize money the courts frequently referred to the vesting of prize in "captors" in an ambiguous manner which made it appear that title was transferred immediately from the original owner to the naval force which made the capture. (*The Mary and Susan*, 1 Wheat. 46). The difficulty comes through the equivocal use of the word "captors" to mean either the capturing state or the individuals of the capturing naval force. When the question has come up directly the court has invariably held that condemnation is always to the government and the actual captors only have rights by reason of explicit grant by the government. Thus an article in the French treaty of 1800 (art. 4, Malloy, p. 497), providing for the restoration of prizes not definitely condemned, but legally captured, was held to violate no vested rights of the captors, (*U. S. vs. the Schooner Peggy*, 1 Cranch 103, *Lincoln Att. Gen.* 1 op. 111), and during the Spanish war of 1808 the president released several captured vessels before adjudication without compensation to the captors for their loss of prize money, (*Moore's Digest*, 7;505; *The Manila Prize Cases*, 188 U. S. 254).

¹¹⁵Resolution of Congress, Nov. 25, 1775, *Journal of Cong.* 1;242, *Ford. ed.* 3;373. See *Moore's Digest*, 7;264. *Henderson vs. Clarkson*, *Supreme court of Pa.*, 2 Dall. 174. (1792); *Keane vs. the Brig Gloucester*, 2 Dall. 36, (1782), *Fed. Court of Appeals*.

¹¹⁶Act. Apr. 23, 1800, 2 stat. 52, sec. 5-7, see *Upton, op. cit.* p. 484.

¹¹⁷Act. June 26, 1812, 2 stat. 760, sec. 4; June 27, 1813, 2 stat. 793, See *Upton, op. cit.*, p. 485.

¹¹⁸Act March 25, 1862, 12 stat. 375; July 17, 1862, 12 stat. 600; June 30, 1864, 13 stat. 306, 314, *Rev. Stat.*, sec. 4630, 4632, 4635, 4642, 4652, *Upton, op. cit.*, p. 489.

to both vessels of the navy and "not of the navy". Provision was also made for the payment of prize bounty of \$100 for each man on board an enemy warship sunk or destroyed in battle if of inferior force to the attacking United States vessel and \$200 if of superior force. Ransom money, salvage, and prize bounty were all to be distributed in the same proportions as prize money. There have been numerous special acts by congress giving prize money in particular cases where the prize was sunk or recaptured, and consequently no claim could be prosecuted under the general law.¹¹⁹

The courts have held that as the statutes make no provision for prize money in case of capture by land forces or jointly by land and naval forces, in such cases the entire proceeds enure to the government.¹²⁰ While non-commissioned captors are legally entitled to no prize money, "it has been the practice to compensate gratuitous enterprise, courage and patriotism, by assigning the captors a part and sometimes the whole of prize" according to Attorney General Wirt.¹²¹ By an act of March 3, 1899¹²² all provisions granting prize money and prize bounty were repealed; thus the entire proceeds of prize now enure to the government, and are according to the act of 1862¹²³ to be used as a permanent naval pension fund.

(b) In early treaties with the Netherlands, Sweden and Prussia¹²⁴ it was reciprocally agreed that where either of the contracting parties recaptured a vessel of the other before twenty-four hours enemy possession, the vessel should be restored with one-third salvage to privateers and one-thirtieth to public vessels. If the enemy had had possession more than twenty-four hours, privateers were permitted to retain the en-

¹¹⁹Special acts granting prize money, *Victory on Lake Erie*, 3 stat. 130; *Case of Algerine vessels*, 3 stat. 315; *Crew of Brig Transfer*, 3 stat. 480; *Crew of the Black Snake*, 4 stat. 23; *Crew of the Bon Homme Richard and the Alliance*, 5 stat. 158; *Crew of the Wasp*, 3 stat. 295.

¹²⁰*The Siren*, 13 Wall. 389; *The Nuestra Senora de Regla*, 108 U. S. 92, 101, (1882).

¹²¹Wirt, *Att. Gen.*, 1 op. 463, (1821). See *The Dos Hermanos*, 2 Wheat. 77. Decisions involving prize money distribution in the Spanish War, *Dewey vs. U. S.*, 178 U. S. 510; *The Manila Prize Cases*, 188 U. S. 254; *The Mangrove Prize Money*, 188 U. S. 720.

¹²²Act March 3, 1899, 30 stat. 1004, 1007.

¹²³Act July 17, 1862, 12 stat. 600, sec. 11.

¹²⁴*Treaties with Netherlands*, 1782-1795, Malloy, p. 1243; *Sweden*, 1783-1798, revived 1816, 1827, art. 17, 18, p. 1730; *Prussia*, 1785-1786, art. 17, 21; 1799-1810, art. 17, 21, pp. 1482, 1492.

tire proceeds while with public vessels the prize should be restored with one-tenth salvage. A statute of 1800,¹²⁵ substantially embodied in the revised statutes of 1878, decrees salvage of one-eighth to the recaptors upon restoration of vessels to the original owner. The principle upon which restoration or condemnation is decreed in cases of recaptured vessels has been considered under obligations of abstention.¹²⁶

The methods adopted for enforcing the obligations of naval forces, have been (1) punishment by court martial for violation of articles for the government of the navy, (2) assessment of damages by prize courts, (3) forfeiture of prize money. In addition to these legal methods of control the conduct of naval forces can be and is ordinarily controlled by executive action exercisable by the president as commander in chief and subordinate naval officers with delegated authority. The abolition of prize money has also been a measure tending toward the protection of neutral rights. The abolition of privateering with the stimulus which it gave toward disregard for the rights of merchantmen, by offering chances for personal gain, has called attention to the fact that prize money created a similar situation in the navy itself. There can be no doubt but that the quest of prize money acts as an incentive to the making of unjustifiable seizures,¹²⁷ and when it was allowed its forfeiture in case of unwarranted seizures was used as a means of enforcing observance of neutral rights among naval vessels. By the abolition of prize money and prize bounty the incentive toward illegal captures has been removed and the movement in the direction started by the abolition of privateering continued.

In the second Hague Conference of 1907, a proposal was made to abolish prize money,¹²⁸ which was still given by all nations except the United States and Japan. It was not accepted, even the United States voting against it on the ground

¹²⁵Act March 3, 1800, 2 stat. 16. The Act June 30, 1864, 13 stat. 306, 314, Rev. Stat. sec. 4652, leaves the determination of the amount of salvage to the court.

¹²⁶Supra, pp. 169 et seq.

¹²⁷See Article by C. C. Binney, The latest chapter of the American Law of Prize and Capture, Am. Law Reg., Sept. 1906, and Editorial Comment, Am. Jour. Int. Law, 1907, 1;484.

¹²⁸Deuxième Conference Internationale de la Paix, Actes et Documents, 3 vols., The Hague, 1907, 3;1148. English translation of this proposal, J. Westlake, International Law, 2 vols., Cambridge, 1910, 2;313. Discussion of the "voeu" which was proposed by the French delegation, in the Acts and Documents, 3;792, 809, 842, 845, 906, 909.

that the matter was a subject proper for local regulation and that it was not desirable to take emphasis from the broader question of abolishing the right to capture private property at sea which the United States was advocating. In the present war, Great Britain has by order in council abolished prize money,¹²⁹ and it seems probable that in course of time it will be acted on internationally as was done in the case of privateering.

¹²⁹Order in Council, Aug. 28, 1914, abolished prize money and established a prize fund to be divided among the whole navy at the end of the war. See Norman Bentwich, *International Law as applied by England in the War*, *Am. Jour. Int. Law*, Jan. 1915.

PART IV. OBLIGATIONS AS A BELLIGERENT TOWARD ENEMIES

CHAPTER XIII. INTRODUCTORY

In their dealings with neutral states, the rights of belligerent states are much in excess of the ordinary rights of states at peace. This is even more true in their dealings with enemies. The recognized rights of a belligerent against its enemy are so great that it sometimes seems impossible to define their limits at all. Yet the establishment of these limits is the purpose of the law of war. As soon as we recognize the existence of such limits to legal rights, we recognize the legal obligations not to exceed them. It is therefore possible to speak of the obligations of a belligerent to its enemy.

The obligations of states have been classified under the five heads, (1) abstention, (2) acquiescence, (3) prevention, (4) vindication, (5), reparation.

(1) Obligations of abstention can be made effective, for the most part, only by act of the sovereign authority of the state. In so far as this is true, municipal law can have no effect in their enforcement. As in the case of obligations of belligerents toward neutrals, the practice of prize courts does furnish a check upon the infraction of some of these duties. By legally adjudicating enemy property captured at sea according to the rules of international law, prize courts interpose between their own government and the enemy owner of the prize, thus compelling observance of the belligerent duty to abstain from confiscation of enemy property declared immune by international law. In this case, therefore, municipal law may aid in the enforcement of the belligerent's obligations of abstention.

(2) Acquiescence seems to be contradictory to the very nature of war. Non-acquiescence, the effort to overcome, appears to be the very essence of the relationship between belligerents. This is true so far as the belligerent state itself is concerned, but the duty of acquiescence is recognized as obligatory upon the non-combatant inhabitants of occupied territory. This duty obviously can

not be enforced by the belligerent state claiming *de jure* sovereignty of the territory, but by the occupying belligerent who has *de facto* sovereignty. The law of the United States does, however, recognize the duty, in that it enforces ordinary commercial acts of individuals, not of direct aid to the enemy, which were performed in pursuance of this duty of acquiescence, even when contrary to the law of the United States.¹ This duty, however, relates to the general subject of the succession of states and the rights of inhabitants of transferred territory which is considered in the chapters dealing with obligations in time of peace.²

(3) The obligations of prevention require a state to prevent certain acts by its officers of government and the inhabitants of its territory which would amount to infractions of international law. It is by enforcing these duties that municipal law can be most effective in enforcing international obligations. The belligerent state comes in contact with its enemy largely through its army and navy. Through municipal regulations preventing infractions of international law by such agencies, this obligation of international law may be made effective.

(4) Vindication, however, is foreign to the law of war. International law does not put a belligerent under an obligation to vindicate illegal acts by its enemy. It does, however, give him a right to retaliate to a limited extent. Retaliation is a *right* to vindicate, not a *duty*. The belligerent is, however, under an obligation not to carry retaliation beyond a certain limit.³ The limit is not fixed or enforceable by any authority. The legitimacy of any particular measure of retaliation is left to the discretion of the sovereign. Municipal law can not control it.⁴

(5) Reparation should also theoretically be a duty of belligerents. Individuals of either belligerent state ought to be able to recover compensation for injuries due to illegal acts of the enemy state. In practice such a condition is impossible. The victor will

¹Thorington vs. Smith, 8 Wall. 1, (1868).

²Supra, pp. 62-63.

³The right of retaliation is recognized in Lieber's Instructions, art. 27, 28.

⁴It should be said, however, that there has been authority in British prize court decisions for the view that courts may refuse to recognize retaliatory measures of their own government so far as they injuriously affect neutrals. See *The Recovery*, 6 Rob. 348, (1807); *The Minerva*, (1807) *Life of Sir J. Mackintosh*, 1:317; *Phillimore, Int. Law*, 3; section 436; *Holland, Studies in Int. Law*, pp. 197-198.

gain full reparation in the treaty of peace, but there is no legal recourse for the loser. The treaty of peace definitively settles the matter, and its terms are fixed according to policy and the result of the conflict. There have, however, been treaties requiring each party to indemnify the other for the care of its prisoners of war, specifically stating that this indemnity shall be considered entirely apart from general indemnities demanded by the conqueror. The Hague conventions also require compensation for breaches of the law of war.⁵ So far as such treaties are enforceable by municipal law, and so far as enemy individuals are assisted by municipal law in obtaining indemnity for injuries, the general rules of the subject of reparation considered under the law of peace will apply.

We shall therefore consider the duties of belligerents toward their enemies under the two heads, (1) obligations of abstention, and (2) obligations of prevention. In the enforcement of the former class of duties, municipal law enforces international law directly. The rules of municipal law bearing on this point are therefore rules of international law at the same time. In the second case, the means employed for controlling the conduct of persons and officers are a matter left to the discretion of the governments. International law does not say how individuals shall be controlled, only what they must be prevented from doing. The municipal law in this class will therefore consist largely of rules supplementary to international law.

⁵Treaties with Prussia, 1785-1796, art. 24, Malloy, p. 1484; 1799-1810, revived 1828, art. 24, p. 1494; Mexico, 1848, art. 22, p. 1118; Hague Conventions, 1907, iv, art. 3.

CHAPTER XIV. OBLIGATIONS OF ABSTENTION

INTRODUCTORY

A belligerent state is bound to abstain from certain acts toward its enemy. Thus it must abstain from committing hostilities until formal warning of war, from the confiscation of public or private debts, from committing acts of hostility against enemy persons domiciled in its territory, from resorting to forbidden methods of warfare, from the inhuman treatment of prisoners of war, from the unnecessary injury of non-combatants, from injuring the sick and wounded and those caring for them, and from injuring scientific, religious and artistic institutions.¹ These duties, however, are obligatory upon the sovereignty of the state. They are beyond the province of municipal law to control, so far as they are duties of abstention. Thus courts have held² that the commencement of war is a political act and they can not question the legitimacy of belligerent measures when the political department of government has recognized the existence of the status. Thus the Hague convention relating to the opening of hostilities must be regarded as directory solely upon the political department of government.

The courts also have held³ that the sovereign may confiscate debts and if it does so unequivocally the courts can offer no recourse to the mulcted enemy person. This statement, however, is subject to limitation. Unequivocal confiscations of the sovereign are undoubtedly valid in municipal law. Confiscations by particular agencies of government may not be. Thus during the Revolutionary war the confiscations by the individual commonwealths were declared void where they conflicted with treaty provisions.⁴ The enforcement of the duty as against inferior agen-

¹Hague Conventions, 1907, iii, iv, vi, Malloy Treaties, pp. 2259, 2269, 2304.

²The Prize Cases, 2 Black 635.

³Brown vs. U. S., 8 Cranch 110, (1814); Ware vs. Hylton, 3 Dall. 199, (1796).

⁴Ware vs. Hylton, 3 Dall. 199, (1796). See treaty with Great Britain, 1783, art. 4-6, Malloy, p. 588. The United States has concluded twenty treaties with fifteen countries, six of which are now in force (1915) forbidding confiscation of public or private debts due enemy persons during war.

cies of government, however, should be classified under duties of prevention rather than of abstention.

By a large number of treaties⁵ the United States has recognized its duty to protect enemy persons domiciled in its territory and to permit them a certain time to wind up their affairs and leave. These treaties also are addressed primarily to the political department of the government. A sovereign act imprisoning domiciled enemies could not be controlled by municipal law. As in the case of confiscation, however, municipal law can enforce such treaties by preventing their infraction by inferior agencies of government.

By its adhesion to the Hague and Geneva conventions the United States has recognized its duty to abstain from forbidden methods of warfare, from the inhuman treatment of prisoners of war, from unnecessary injury to non-combatants and from injury to red cross agencies and to the sick and wounded in their care. So far as they are duties of abstention, these matters are addressed to the political department of government, but they may be indirectly enforced by the control, through municipal law, of the armed forces of the government, and will be considered under obligations of prevention.

In the enforcement of prize law, however, the obligation of the belligerent state to observe certain restraints in the capture of enemy property at sea is enforced through municipal law directly against the government. The principle observed by the United States prize courts and other rules of municipal law bearing on this point will therefore concern us at this point. In at least one case, also, judicial methods have been provided for the protection of enemy private property on land. This case merits brief consideration.

ENEMY PRIVATE PROPERTY AT SEA

The general right of capturing enemy property at sea is recognized by international law but there are specified cases in which the belligerent must abstain from such captures. The enforce-

⁵Protection to resident enemy persons has been guaranteed in twenty-seven treaties with twenty-three countries, of which the following are now (1915) in force: Argentine Republic, 1853, art. 12, Malloy, p. 24; Bolivia, 1858, art. 11, p. 122; Columbia, 1846, art. 27, p. 310; Costa Rica, 1851, art. 11, p. 345; Honduras, 1846, art. 11, p. 956; Italy, 1871, art. 21, p. 975; Mexico, 1848, art. 22, p. 1117; Paraguay, 1859, art. 13, p. 368; Prussia, 1799-1810, revived 1828, art. 23, p. 1494; Sweden, 1783-1798, revived 1816, 1827, art. 22, p. 1732.

ment of this duty is provided for by the rule recognized in the United States whereby all prizes, enemy as well as neutral, are submitted to prize courts before final appropriation. The general principles of prize court jurisdiction and procedure have been discussed under the law of neutrality⁶ and it should again be emphasized that the whole institution of prize courts is primarily intended for the benefit of neutrals. Enemies benefit from them only incidentally. The rules applied in distinguishing enemy and neutral property and vessels has also been discussed as has the attitude of the United States on the question of total immunity of enemy private property from seizure during war.⁷

In the case of neutral vessels and goods, immunity from capture is the general rule. Capture can only be justified in certain exceptional cases, as breach of blockade, carriage of contraband, unneutral service, constructive enemy character, or necessity. With enemy property and vessels the case is reversed. Here the rule is liability to capture. Cases of immunity are exceptional. Under the two treaties⁸ which the United States has concluded, insuring the total immunity of enemy private property during war, this would not be true, and if this principle were adopted as a general rule, a condition which the United States has advocated since the foundation of the Republic and notably at the second Hague conference, enemy private property and merchant vessels at sea would be in practically the same condition as neutral vessels and property are today. This condition, however, does not exist, and by international law cases in which enemy property at sea is immune, are exceptions to the general rule of liability.

The cases in which enemy property at sea is immune from capture are defined in the Declaration of Paris and the Hague conventions and may be classified as (1) vessels in port on the outbreak of war, (2) vessels leaving their last port before the outbreak of war, (3) postal correspondence, (4) coast fishing vessels, (5) enemy property under the neutral flag, (6) "vessels charged with a religious, scientific or philanthropic mission," (7) hospital ships bearing the red cross flag when they are commissioned and authorized by the belligerent government. In the

⁶Supra p. 187 et seq.

⁷Supra, pp. 158, 166.

⁸Treaties with Prussia, 1785-1799, art. 23, Malloy, p. 1484; Italy, 1871, art. 12, p. 973.

last two cases public as well as private owned vessels are immune from capture.⁹

The immunities granted in these cases were provided for in Stockton's Naval War code of 1900 to 1904.¹⁰ In the proclamation and instructions¹¹ on the outbreak of the Spanish war, days of grace on departure with immunity until they reached a home port were granted to enemy vessels, and the immunity of vessels bound for the United States which left their last port before the outbreak of war was also prescribed, the rule being applied in several cases.¹² In the case of the *Paquete Habana*,¹³ arising during the Spanish war, the court held that coast fishing vessels of the enemy were not liable to capture, before the enunciation of this doctrine by any international convention.

The immunity of enemy property under the neutral flag is a doctrine which has been supported by the political department of the government since its foundation, but not given legal recognition until the war of 1898, when the president's proclamation required adhesion to the rules of the Declaration of Paris in this respect.¹⁴ In many of the early treaties the doctrine of "free ships, free goods" had been specified as binding between the contracting parties.¹⁵

Although there have not been a great many cases before the prize courts in which these immunities have been applied, in the few cases that have come up the court has followed the rules laid down in treaties and executive orders. The general principle requiring the adjudication of all prizes operates as a guarantee to the enforcement of this duty of abstention.

⁹See Hague Conventions, 1907, x, arts. 1-3, vi, xi.

¹⁰Stockton's Naval War Code, 1900-1904, arts. 13-15, 21-22.

¹¹Proclamation, Apr. 26, 1898, 30 stat. 1770; Instructions, June 20, 1898, art. 7, For. Rel. 1898, 780.

¹²The *Buena Ventura*, 175 U. S. 384, was released under the proclamation. The *Panama*, 176, U. S. 535, although in the terms of the exemption, was condemned as an armed vessel forming part of the enemy auxiliary navy, a case provided for in the proclamation. The *Pedro*, 175 U. S. 354, although her ultimate destination was the United States, was condemned because her immediate voyage was to an enemy port. The doctrine of continuous voyage was here denied, where it would have operated to the advantage of an enemy vessel. Four justices dissented from this opinion but it was followed by the court in the case of the *Guido*, 175 U. S. 382. See Moore's Digest, 7:453-9.

¹³The *Paquete Habana*, 175 U. S. 677, (1899).

¹⁴Proclamation, Apr. 26, 1898, 30 stat. 1770.

¹⁵This principle has been embodied in thirty-one treaties, with twenty-one countries. Seven are now (1915) in force. *Supra* p. 164, note 106.

Were the international prize court established as provided by the Hague conventions of 1907, cases involving these immunities would all be subject to its jurisdiction.¹⁶ By its signature of this convention and its consent to its ratification, the United States signified its willingness to add this further sanction to the enforcement of these duties.

ENEMY PRIVATE PROPERTY ON LAND

According to international law, enemy private property on land is exempt from capture.¹⁷ Consequently, the government is under an obligation to abstain from such captures. Exceptions to this rule are recognized in the case of necessity, which justifies military requisitions. The expense of administering territory under military government may also be reimbursed by money contributions of the inhabitants, which thus resemble taxes. In both of these cases the enforcement of the rule is in the hands of military authorities, and is discussed in considering the obligations of prevention in relation to the land forces.¹⁸

Ordinarily the sanction of military law, controlling the armed forces, alone guarantees this obligation of abstention. There is no possibility of recourse to judicial authority as is provided in the case of naval captures. Prize courts have repeatedly asserted that their jurisdiction does not extend to land captures.¹⁹ The reason for this difference is to be found in the fact that in naval war, questions of neutral rights are apt to be involved; whereas this is not so true in land captures. Property on enemy territory is *prima facie* enemy property. The enemy's privilege of a judicial adjudication of his property captured at sea arises from the probability of its association with neutral property.

It is not, however, impossible that all property seized on

¹⁶The international prize court is given jurisdiction over enemy property when the case involves enemy cargo in a neutral ship, and when a claim is based on an allegation that the seizure has been effected in violation of the provisions of a convention or of an enactment of the belligerent captor. Hague conventions, 1907, xii, art. 3. See Charles, *Treaties*, 1913, p. 250.

¹⁷United States courts have stated this principle, see *Brown vs. U. S.*, 8 Cranch 110, (1814); *U. S. vs. 1756 shares of capital stock*, 5 Blatch. 231; *U. S. vs. Klein*, 13 Wall. 128, 137; *Lamar vs. Brown*, 92 U. S. 194, *Moore's Digest*, 7:288-289.

¹⁸*Infra*. p. 210.

¹⁹*Brown vs. U. S.*, 8 Cranch. 110, (1814); *Kirk vs. Lynde*, 106 U. S. 315, 317; *Oakes vs. U. S.*, 174 U. S. 778, 786, (1899).

land should be subject to legal adjudication before confiscation. The British prize courts have in fact been given jurisdiction of such seizures.²⁰ In the United States the abandoned and captured property act of 1863²¹ furnished a somewhat similar remedy during the Civil war. By this act, a sum equal to the value of captured property was to be deposited in the treasury, and persons claiming ownership were permitted to prosecute claims for such property in the court of claims. Property intended for use in waging war such as arms, ordinance ships, steamboats, forage, military supplies, etc., were excluded, and persons who had given "aid or comfort" to the rebellion were denied this privilege.

Such privileges as this have not been granted in other wars. This act probably was due to the fact that being a civil war, many inhabitants of the seat of war were loyal to the union cause. The act was to reimburse such persons, rather than enemies. As a matter of fact, by an act of 1864²² it was specifically declared that the jurisdiction of the court of claims should not extend to general claims "against the United States growing out of the destruction or appropriation of or damage to property by the army or navy" during the Civil war.

In general therefore the United States does not provide for the enforcement by means of judicial adjudication of its duty to abstain from capturing enemy private property on land. The duty is enforced indirectly by measures for preventing illegal seizures by armed forces.

²⁰Statute 1840, 3-4 Vict. c. 65, sec. 22, *The Banda and Kirwee Booty* L. R. 1 Adm. and Ecc. 109 (1866) Pitt Cobbett cases and opinions on international law, 2 vols., London, 1913, 2;201.

²¹Act March 12, 1863, 12 stat. 820; Moore's Digest, 7;295-300. Cases under this act, see *Young vs. U. S.* 97 U. S. 39, (1877); *Briggs vs. U. S.*, 143 U. S. 346, (1892); *Vance vs. U. S.*, 30 Ct. Cl., 252. British subjects enjoy the benefits of this act, *U. S. vs. O'Keefe*, 11 Wall. 178; *Carlisle vs. U. S.* 16 Wall 147.

²²Act, July 4, 1864, 13 stat. 381.

CHAPTER XV. OBLIGATIONS OF PREVENTION

INTRODUCTORY

It is for the most part through the enforcement of the duty of prevention, as against its armed representatives, that the state fulfills its duties of abstention; and it is largely through the municipal sanctions thus enforced that the law of war is observed at all. The belligerent's duties toward neutrals tend to be observed because of the sanctions of international law. Neutrals can bring threats of force and demands for reparation which the belligerent usually finds it convenient to heed. But in the law of war the enemy is already using all the force he can. The treaty of peace definitely concludes any further demand for reparation. What therefore is the force which causes obedience to the law of war? There is none, except that of self-interest. Reciprocity benefits both belligerents. Each knows that a breach of law on its part will bring about a retaliatory breach by the other. If this process were continued, war rights would soon pass all limits, the law of war would disappear and savagery would prevail. It is only in so far as the principle of reciprocal benefit acts that the law is obeyed.

The state must therefore take extreme care that its armed representatives do not unwittingly break the law of war, for the minute the breach is made, a progressive march of retaliation and counter-retaliation will have begun which, although contrary to the self-interest of both, neither can stop. We will therefore discuss the laws of the United States designed to prevent infractions of the law of war by its (1) land forces and (2) naval forces. As a third division we will consider the laws of like effect in reference to (3) the civil population.

ACTS BY LAND FORCES

Military law, military government, and martial law are three terms relating to the legal position of land forces in time of war which should be distinguished.¹ Martial law is the law in force in portions of the home territory of a belligerent near

¹On these distinctions see *Ex Parte Milligan*, 4 Wall. 2; W. E. Birkheimer, *Military Government and Martial Law*, 2nd. ed. London, 1904; p. 21, 372, G. B. Davis, *Treatise on Military Law*, p. 6.

the seat of war or in a state of insurrection. It is a matter regulated entirely by constitutional law and as its effect is primarily domestic it has no connection with international law, except in case neutrals are injured by the suspension of constitutional guarantees, in which case international questions would arise, but extraneous to the present topic.

Military government exists when an army is in secure occupation of a portion of enemy territory. The law applied under military government, (to which the term martial law is also sometimes applied),² bears a relation to martial law, but in reality the condition is somewhat different. In the latter case the persons affected are for the most part citizens; in the former they are foreigners. The law of military government, therefore, is a matter governed by international law. The occupying belligerent owes obligations to the inhabitants and they owe obligations to it, both of which are determined by international law. We are therefore concerned here with the law of military government which the United States requires of its armies.

Military law is the law regulating the conduct of the army. It consists of the rules defining the powers and liabilities of military officers and enlisted men and the means of enforcing them. It defines the constitution of military tribunals, such as courts martial, military commissions and commissions of inquiry, their jurisdiction and their procedure, as well as the rules of executive subordination and enforcement of discipline. In the United States, military law is found in statutes, army regulations, and instructions and opinions of courts, attorneys general and judge advocates general.³ Military law is not a part of international

²See Lieber's Instructions, art. 1-10. By applying the theory of de facto governments, that sovereignty passes immediately upon effectual occupation of the territory, the law of military governments fulfills our definition of martial law, for the occupied territory has become home territory. With this conception the law of military government would be a subject of constitutional rather than of international law. Because of the practical difference and because of the fact that military government is regarded as a temporary and not permanent transfer of sovereignty, it seems well to preserve the distinction.

³The statutory laws relating to the control of the army, annotated with references to court decisions, and official opinions, may be found in "The Military laws of the United States", 1901, ed. G. B. Davis, with supplement to 1911, ed. J. B. Porter. The "Digest of Opinions of the Judge Advocates General of the Army" published in 1912, C. R. Rowland, ed., also contains references to statutes, cases and opinions of attorneys general bearing on the various points. See also annual publication of Army Regulations and General Orders of the War Department.

law. The relationships it defines are entirely domestic. Yet it is of great importance for our present subject, for it is through the sanctions of military law that the army is compelled to obey the law of war. Much of it consists of laws supplementary to international law.

There has long been a discussion whether war is a relation between states or between armies. The latter view was eloquently espoused by Rousseau⁴ and apparently influenced the early statesmen of the United States. At any rate the policy they established, now a national tradition, that private property ought to be immune from capture in war, is in harmony with it. The present regime of universal conscription armies seems to nullify the theory, in Europe at least. In our view Rousseau's dicta is untenable. The relationship is one between two communities or states, not between two armies or two navies. Facts are sufficient justification for the assertion. It is, however, clear that though both are enemies a distinction exists between combatants and non-combatants. We may therefore consider successively the duties of the army to (1) combatants and (2) non-combatants.

(1) The duties of armed forces toward enemy combatants include such matters as the employment of only legitimate means of warfare, care of sick and wounded, treatment of prisoners of war and spies, observance of flags of truce, armistices, etc.

A number of early treaties prescribed humane treatment for prisoners of war.⁵ All of the subjects mentioned are regulated in detail in the Hague conventions of 1899 and 1907 relating to the laws of war on land and in the Geneva conventions of 1864 establishing the red cross flag and prescribing rules for the care of the sick and wounded. By its ratification of these treaties the United States has made them law for its armies. The same matters are covered by Francis Lieber's celebrated instructions for the government of the armies of the United States in the field, written during the Civil war. On April 24, 1863, these instructions were officially promulgated as a general order of the war department and are therefore binding law for the army. The in-

⁴J. J. Rousseau, *The Social Contract*, Translation by Tozer, London, 1909, p. 106. See discussion on this question, J. Westlake, *Principles of International Law*, Cambridge, 1894, p. 258; G. M. Ferrante, *Private Property in Maritime War*, *Pol. Sci. Quar.*, 20, 706, (1895).

⁵Treaties, Algiers, 1816-1830, art. 17, p. 15; Prussia, 1785-1796, art. 24, p. 1484; 1799-1810, revived 1828, art. 24, p. 1494; Mexico, 1848, art. 22, p. 1118; Morocco, 1787-1836, art. 16, p. 1209, Tripoli, 1805-1911, art. 16, p. 1791.

structions give detailed regulations defining the limits permitted by necessity and by retaliation, the treatment of prisoners of war and spies, use of flags of truce, exchange of prisoners, and prohibited measures such as assassination.

The enforcement of these laws is largely in the hands of military commissions. Courts martial, being of statutory jurisdiction, can not take cognizance of many of these cases, as violations of the laws of war are not listed in the offenses specified in the articles of war.⁶ By statute courts martial are, however, given jurisdiction over the trial of spies,⁷ and over officers or soldiers injuring persons bringing provisions or other necessities to the army while in "foreign parts". This jurisdiction extends to camp followers, retainers and militia in the service of the government, as well as the regular army and volunteers violating the articles of war.⁸ The imposition of criminal penalties upon violators is the means employed by both courts martial and military commissions for enforcing the law.⁹ It must not be lost sight of, however, that the control of the army is largely executive rather than legal. It is to the discretion of commanding officers that enforcement of the laws of war, whether unwritten, in treaties, or in orders, is left.¹⁰

(2) Non-combatants vary in legal rights somewhat according to circumstances. Thus non-combatants domiciled in the belligerent's own state, in territory under military government and in the actual zone of hostilities enjoy different immunities. The army does not affect the first class. Their treatment will be considered under the duties of the civil population.

⁶On authority and jurisdiction of courts martial and military commissions see Rev. Stat. sec. 1342-1343; Military Laws, 1911, p. 744, note 1, p. 745; Dig. Op. Judge. Ad. Gen., 1912, p. 1067; Lieber's Instructions, art. 13.

⁷Rev. Stat. sec. 1343.

⁸Articles of War, Rev. Stat., sec. 1342, art. 56, 63, 64. Courts martial may punish members of these classes for felonies in time of war, (art. 58) and soldiers for being found over a mile from camp without leave, (art. 34).

⁹Dig. Op. Judge Ad. Gen., 1912, pp. 510-511, 1071-1072.

¹⁰By the Articles of War an officer must keep good order and "to the utmost of his power, redress all abuses and disorders which may be committed by an officer or soldier under his command, (art. 54) and officers guilty of conduct unbecoming an officer and a gentleman may be dismissed." (art. 61).

In the second case the United States has recognized the principles that such persons are immune from injury and their property from confiscation so long as they observe their duty of acquiescence to the occupying government. The duties of the army in this connection are prescribed in the Hague conventions and in Lieber's instructions. Special instructions to army officers are also usually issued providing rules for military government. It is a remarkable fact that during General Scott's occupation of parts of Mexico in 1846, he enforced the general rule of paying for requisitions and levying only contributions in lieu of taxes to pay for the civil administration of the territory, until he had received special instructions from Washington to adopt a harsher practice. It was thought that Mexico was continuing the war because the civil population was not feeling its hardship, consequently the instructions ordered him to support his army by uncompensated seizures. Very reluctantly he undertook this policy, which is contrary to modern international law and in his opinion at that time was inexpedient. Here was a case where the discretion of the general on the field was more efficient in enforcing the law of war than that of authorities higher up.¹¹

The conduct toward non-combatants in the actual zone of hostilities is also provided for in the Hague conventions. A number of early treaties provided for the immunity of non-combatants in person and the payment for all requisitions.¹² The Hague conventions besides covering these points forbid unnecessary injuries to non-combatants, the bombardment of undefended towns, and pillage. Similar matters are covered in Lieber's instructions. Special statutes and instructions, however, especially during the Civil war, have required a far harsher treatment.¹³ The treaties and instructions covering these points are law and enforceable through the exercise of penal jurisdiction by military commissions and through executive coercion. The preservation of the rights of non-combatants may also be enforced through laws providing for their indemnification for requisitions, after the war. This is provided for in the provi-

¹¹Moore's Digest, 7;282-285.

¹²Treaties with Prussia, 1785-1796, art. 23, p. 1414; 1799-1810, revived 1828, art. 23, p. 1444; Mexico, 1848, art. 22, p. 1117; Italy, 1871, art. 21, p. 975.

¹³Confiscation act, July 17, 1862, 12 stat. 589. On confiscation of cotton and slaves during the Civil war see Moore's Digest 7;300-366. For orders during Mexican war see Moore's Digest 7;282-285.

sions of the Hague conventions and Lieber's instructions which require the giving of cash or receipts, good after the war for all requisitions.¹⁴ In the Civil war by the captured and abandoned property act¹⁵ the United States provided for the indemnification of non-combatants. A sum equal in value to all requisitions was to be deposited in the treasury and all persons were compensated from this fund if they could prove that they had taken no active part in the rebellion.

ACTS BY NAVAL FORCES.

The law governing the conduct of the naval authorities is contained in statutes, regulations, instructions, and the opinions of courts.¹⁶ Naval courts martial with jurisdiction over offenses against the statutory articles for the government of the navy are provided, but the enforcement of the law of naval warfare is largely intrusted to the discretion of commanding officers.

(1) The duties of the navy toward enemy combatants are specified in the Hague convention of 1907 and the Geneva conventions as applied to naval warfare adopted at the same time. In 1868 a treaty was signed extending the provisions of the Geneva convention to naval war. It was not generally ratified, although the United States did so in 1882. In 1898 the United States issued a circular stating that these additional articles would serve as a *modus vivendi* during the war with Spain, and in consequence the Navy Department issued a General Order requiring the observance of these regulations in the treatment of "The Solace", which had been fitted out as an ambulance ship.¹⁷ Besides incorporating the principles of the Geneva convention, the Hague convention of 1907 limits the use of submarine contact mines, and the bombardment of undefended coast towns. In Stockton's Naval War Code, in force from 1900 to 1904, and in instructions issued at the beginning of wars¹⁸ the limits of hostile acts against enemy public forces have been

¹⁴Hague Conventions, 1907, v, art. 52; Lieber's Instructions, art. 38.

¹⁵Act March 12, 1863, 12 stat. 820. See Moore's Digest, 7;295-300.

¹⁶Articles for the government of the Navy, Rev. Stat. sec. 1624; Regulations for the Government of the Navy of the United States, 1913, containing also permanent instructions.

¹⁷Additional articles to Geneva Convention, 1868, *Modus Vivendi*, 1898, General Order of Navy Dept., and Correspondence, Malloy, *Treaties*, p. 1907-1924.

¹⁸Instructions to Blockading vessels and Cruisers, June 20, 1898, Gen. Ord. 492, For. Rel. 1898, p. 780.

prescribed. In the navy regulations of 1913 it is provided that "when the United States is at war, the commander in chief shall require all under his command to observe the rules of humane warfare and the principles of international law."¹⁹ It will thus be seen that, as in the case of the army, the enforcement of the duties of naval war is largely left to the executive control of naval officers.

(2) The duties of the navy toward enemy non-combatants relate largely to the exercise of the right of capturing private property at sea, but certain restrictions upon possible injury to persons are also required. Naval forces are forbidden bombarding undefended coast towns, indiscriminately laying submarine contact mines or unnecessarily cutting cables between belligerent and neutral territory, by the Hague conventions of 1907.²⁰ These provisions are designed for the protection both of enemy non-combatants and of neutrals. The same obligations with the exception of that relating to mines were prescribed in Stockton's Naval war code and it was especially stated that "non-combatants are to be spared in person and property during hostilities as much as the necessities of war and the conduct of non-combatants will permit."²¹

The enforcement of these duties, like those required in dealing with enemy armed forces, is left to the authority of naval officers, subject to the control of the navy department through instructions and executive action.

In general the duty in reference to the seizure of enemy property at sea is enforced by the same measures as those relating to the seizure of neutral prizes. The law of prize grew up for the benefit of neutrals but because of the frequent difficulty of determining between neutral and enemy property at sea, enemy individuals are benefited by the same rules.

As pointed out in considering the law of neutrality, the seizure of prizes by public naval forces alone, their care, treatment, bringing in and adjudication are provided for in treaties, and instructions of the navy department. These provisions are made effective by such measures as the abolition of privateering, the abolition of prize money, the holding of vessels liable in damages for seizures without probable cause, and by the establishment of prize courts with adequate jurisdiction. Although

¹⁹Navy Regulations, 1913, sec. 1635.

²⁰Hague Conventions, 1907, iv, art. 54, viii, ix.

²¹Stockton's Naval War Code, art. 3, 4, 5.

enemy prizes benefit in the main by provisions applicable to neutrals, this is not always true. Enemy property is *prima facie* condemnable; therefore it is seldom that damages can be obtained for a seizure even where the vessel proves to be immune.²² Also, because of this *prima facie* liability, the destruction of enemy prizes is not, by the Declaration of London, made subject to such grave presumptions of illegality, and the treatment to be accorded the officers and crew of enemy vessels is different from that in the case of neutrals.²³

The general principle that prizes must be brought in and that title does not pass until legal adjudication applies to enemy private vessels as well as neutral. The law applied by prize courts in adjudicating enemy prizes has been considered in treating the belligerent's obligations of abstention toward neutrals and enemies.

ACTS BY THE CIVIL POPULATION.

International law requires a belligerent state to prevent its citizens from performing certain acts against the person and property of enemy individuals. In a large number of treaties the United States has recognized the principle that enemy individuals in its territory are immune from injury or confiscation of property.²⁴ During both the Mexican and Spanish wars special instructions specifically called attention to such treaties.²⁵ The usual criminal laws of the states serve to prevent the spo-

²²The *Paquete Habana*, 175 U. S. 677, (1899); and 189 U. S. 453, (1903).

²³The Declaration of London, 1909, art. 48-54, on destruction of neutral prizes.

²⁴The United States has concluded twenty-seven treaties with twenty-three countries on this subject. Ten are now in force. As examples see treaty with Mexico, 1831-1881, art. 26, p. 1903; 1848, art. 22, p. 1117, Spain, 1795-1902, art. 13, p. 1645. Generally a time is specified, varying from six months to a year, in which merchants may wind up their affairs and leave the country unmolested. *Supra*, p. 202, note 5.

²⁵Circular of Treasury Department to customs collectors, June 11, 1846, Br. and For. St. Pap., 34:1138, calling attention to the treaty of 1831, giving Mexican merchants the right to leave the country, and letter of Asst. Sec. of State, J. B. Moore, *Moore's Digest*, 7:255, calling attention to the provisions of the Spanish treaty of 1795. Spain claimed that the treaty was abrogated by the war, a claim which the United States denied. Such provisions as this would obviously be meaningless if the treaty were abrogated by war. Several of these provisions are followed by the statement that they shall not be abrogated by war; See Treaty with Prussia mentioned, *supra* p. 202, note 5.

liation of such aliens the same as in time of peace. The treaties would also avail to gain freedom for the alien in case of detention by executive authority unless such detention were specifically authorized by act of congress or unless martial law had been declared in the territory in question. Where such cases exist, undoubtedly the courts could not intervene to release detained enemy persons. In the alien enemies act of 1798 the detention or removal of such persons is provided for but express provision is made for the observance of treaty exemptions.²⁶ During the Civil war numerous detentions of this kind were made, and although the courts held after the war that they were not in all cases justifiable according to the constitution, as a matter of fact while war was in progress judicial process was of no benefit to the prisoners.²⁷ In this case there were, of course, no treaties providing immunity.

United States law recognizes the principle that all commercial intercourse between enemies stops at the outbreak of war and the courts will not enforce obligations due to enemies on contracts or commercial transactions made after the outbreak of war.²⁸ The principle is, however, by no means of universal application. Private contracts valid before the war are valid after it, unless, as in the case of insurance contracts, time is an element.²⁹ In such cases war suspends but does not abrogate contracts. Furthermore contracts made in good faith, which have no relation to the war, may be enforceable even when made during war. Such a contract has been upheld where both parties were domiciled in the same territory,³⁰ and a devise by a United States citizen to an alien enemy, resident in the enemy country, was upheld.³¹

The confiscation of debts or other enemy property on land in the absence of express act of the sovereign has also been forbidden³² by the courts. After the Revolutionary war the

²⁶Act July 6, 1798 1 Stat. 577. Rev. Stat. sec. 4067-4070.

²⁷Ex parte Milligan, 4 Wall. 2.

²⁸Scholefield vs. Eichelberger, 7 Pet. 586; The Rapid, 8 Cranch 155, (1814); President's proclamation Aug. 16, 1861, 12 stat. 1262.

²⁹N. Y. Life Ins. Co. vs. Statham, 93 U. S. 24, (1875).

³⁰Kershaw vs. Kelsey, 100 Mass. 561. (1868).

³¹Fairfax' Devisee vs. Hunter's Lessee, 7 Cranch 603, (1813). On this general subject see Moore's Digest, 7;237-254.

³²Georgia vs. Brailsford, 3 Dall. 1; Ware vs. Hylton, 3 Dall. 199; Stanbery, Att. Gen., 12 op. 72, (1866); Planters Bank vs. Union Bank, 16 Wall. 483; Williams vs. Bruffy, 96 U. S. 176, (1877); Brown vs. U. S. 8 Cranch 110, (1814).

courts held state confiscation acts invalid, as conflicting with the British treaty of peace. The fact that a citizen had paid his debt to the state treasury was held to be no bar to the British creditor's right of action.³³ Confiscation acts by congress would undoubtedly be regarded as valid even when opposed by treaties, as acts of congress are ordinarily held to supersede earlier treaties. Whether the passage of such an act at all is within the constitutional competence of congress is a question not considered here. If the guarantee of enemies against confiscation of debts were included in the constitution, undoubtedly the privilege could be enforced even against congress by the power of the courts to declare laws unconstitutional. In the absence of a treaty, constitutional provision or federal statute, it is questionable whether state statutes confiscating enemy debts could be prevented by the courts.

The confiscation of enemy private property on land when in the zone of hostilities or in territory under military government is justified on principles of necessity under the restrictions required in levying requisitions and contributions by the army. Where the property is in the belligerent state's own territory, not under martial law, the plea of necessity can not be offered. In such cases the courts have held that the property may not be confiscated unless an act of the sovereign specifically requires. The outbreak of war does not itself confiscate enemy property, although the court held that confiscation by the sovereign was compatible with international law, a view no longer held.³⁴

Enemy merchant vessels in the belligerent's jurisdiction on the outbreak of war are subject to the same rule. By the Hague convention they may not be confiscated unless by their build they show that they "are intended for conversion into war ships." The same convention, however, permits such vessels to be detained or requisitioned with compensation where they can not leave in a short time because of "force majeure," but permission to leave in a specified time is declared "desirable".³⁵ The United States followed this rule in its naval instructions

³³Ware vs. Hylton, 3 Dall. 199, (1796).

³⁴Brown vs. U. S. 8 Cranch 110, (1814); Cargo of Ship *Emulous*, 1 Gall. 562; U. S. vs. 1756 shares of Capital Stock, 5 Blatch. 231.

³⁵Hague Conventions, 1907, vi. This convention has not been signed or ratified by the United States.

of the Spanish war.³⁶ The subject has been discussed at greater length in considering duties of abstention. Suffice it to say here that the law of the United States attempts to prevent the confiscation of such vessels as well as other enemy private property in its jurisdiction on the outbreak of war.

³⁶Instructions, June 20, 1898, art. 7, For. Rel. 1898, p. 780; Proclamation, Apr. 26, 1898, 30 stat. 1770.

CHAPTER XVI. CONCLUSION.

The views enunciated in the foregoing pages are based on the theory that all rules of conduct, for a breach of which states as such are held liable, are rules of international law. Viewed from this standpoint, the rules of international law can be divided into two general classes: (1) those prescribing conduct for the sovereign power in states, (2) those prescribing conduct for persons and governmental agencies subject to the control of the sovereign power.

RULES OF INTERNATIONAL LAW PRESCRIBING CONDUCT FOR SOVEREIGN POWERS

In a sense all rules of international law fall in the first class. The responsibility for the observance of international law and consequently the duty of enforcing it, rests with sovereigns. Yet if we consider the rules themselves, and regard the conduct prescribed rather than the responsibility imposed, a large part of them belong in the second class and are capable of enforcement by municipal law.¹

It is hoped that the foregoing pages have indicated what these rules are and the manner in which they are enforced by the municipal law of the United States.

The rules of international law which prescribe conduct for the sovereign alone are known as "political questions", and embrace such matters as the recognition of new states, and newly acquired territory, intervention, termination of treaties and declarations of war. In respect to these matters, international law has laid down rules of varying definiteness. It attempts to determine when new states, new governments, and belligerent and insurgent communities must be recognized, when intervention is proper, under what conditions treaties may be terminated, etc. According to the older writers, it detailed the circumstances under which a just war might be waged. Observance of these rules, if indeed they are rules of international

¹"This usage thus becomes not merely a rule for the guidance of the state, but for the guidance, enjoyment and observance of the individual member of the body politic, and the very claim of the rule in question makes it of necessity a measure of municipal right and duty." J. B. Scott, *The Legal Nature of International Law*, *Am. Jour. Int. Law*, 1:857, (1907).

law at all, is, however, left to the discretion of the political departments of the government. In the United States the president and congress act in such circumstances according to their views of national policy. They may ordinarily follow the practice of nations in making these decisions, but it is certain that municipal law can not compel them to do so. The questions are political in character. Municipal law adjusts itself in accordance with such political acts, but does not control them. The judicial and administrative organs of government in these matters will look to the political organs for guidance, exclusively. They will not look beyond them, to international law. However, even in rules of this character, where international law itself does not look down to the officer or individual upon whose activity the effectiveness of the rule must ultimately depend, municipal law may perform this step. It may specify and enforce obligations upon the public officers and subjects of the state by permanent rule, the performance of which will insure the observance by the state of those prescriptions of international law directed to it. Municipal law of such character, filling in the necessary details of international law in reference to the duties of officers and private persons, is of the greatest importance in considering the legal sanctions for the enforcement of international law, and has here been referred to as municipal law, supplementary to international law.

RULES OF INTERNATIONAL LAW PRESCRIBING CONDUCT FOR PERSONS AND OFFICERS

The second group of rules of international law prescribes conduct for private persons and public officers. Such rules may be effectively enforced, may be rules of law in the Austinian sense, through concurrent enforcement by the municipal law of all civilized countries. Yet they continue to deserve the name international because it is on account of the pressure of international public opinion that they are thus concurrently enforced by states.² States are held internationally responsible

²Fitzjames Stephen remarks that international law is not law so far as it is international and is not international so far as it is law. (History of the Criminal Law of England, 2:35). With the Austinian conception of the law this dilemma is inevitable if we accept the literal meaning of the term international law, as a law between states. However, by admitting as rules of international law those in which a vicarious liability is imposed upon states for acts of individuals, we believe it is possible to vindicate the term. With such rules the incidence of the *liability* and of

for their observance. Many rules of this character as well as rules supplementary to international law are enforced through the law of the United States. The obligation to enforce them has been recognized in treaties, statutes, executive orders and judicial decisions.

(1) *Treaties.*

Much of international law has been included in treaties to which the United States is a party. Especially is this true in reference to the laws of war and neutrality which have been to a considerable extent codified in the Hague and other international conventions. It must, however, be emphasized that although declared law by the constitution, treaties may embrace political questions incapable of enforcement through municipal law. The constitutional provision and the practice of courts and executive officers in giving direct effect to treaties, so far as they apply to individuals, impart a municipal sanction to the rules of international law thus defined.

the *sanction* are distinct. The rules are international because by general international practice, states are held liable. Yet the rules may relate to the conduct of individuals and be capable of sanction by state authority. In so far as they are thus sanctioned by concurrent adoption into the municipal law of states they would conform to Austin's definition of law. It seems to the author that different writers on the legal nature of international law have written to cross purposes from failure to reach an agreement as to whether the character of the rule, especially the responsibility it implies, or the character of the sanction is the criterion of international law. It is too clear to demand refutation that if no rules are international law except those enforceable against states, international law can not be a part of municipal law. We agree that "while the principles which international law embodies are the product of international usage and agreement, their legal force as rules controlling the administration of justice between litigants is derived from the sanction of the state whose justice the courts administer and by whose laws the courts themselves are created." (Willoughby, *Am. Jour. Int. Law*, 2:357). This, however, simply states that effective sanction can be given to rules only through state authorities, and if this sanction is given the rules are municipal law. If we take the character of the rule rather than of its sanction as our criterion of international law, Willoughby's statement does not prevent the rule being at the same time a rule of international law. See J. B. Scott and W. W. Willoughby, *The Legal Nature of International Law*, *Am. Jour. Int. Law*, 1:831, 2:357, and an effort to reconcile these two articles. Note, *Harvard Law Review*, 22:66. See also John Westlake, *Is International Law a part of the law of England?* *Law Quar. Rev.* 22:14.

(2) *Statutes.*

Holland calls attention to the fact that in England an "express recognition of international law in an act of parliament is extremely rare,"³ and he notes only five cases⁴ in which the term is used expressly. In the United States statutes, the use of the term appears to have been more frequent. "The law of nations," which is generally used in preference to the more recent term "international law," is of frequent occurrence.⁵ The most important statutes bearing on our subject

³T. E. Holland, *Studies in International Law*, Oxford, 1898, p. 193.

⁴The term "law of nations" is used in the act relating to the privileges of ambassadors, 1709, (7 Anne c. 12), the prize jurisdiction of the court of admiralty, 1815 (55 Geo. III. c. 160, sec. 58), The Naval Prize Act, 1864 (27-28 Vict. c. 25), and "International Law" in the Territorial Waters Jurisdiction Act, 1878, (41-42 Vict. c. 73, sec. 7) and the Sea Fisheries act, 1883, (46-47 Vict. c. 22, sec. 7). Holland also notes the use of certain terms peculiar to international law as "neutral ship," "proclamation of neutrality," "belligerent" in a few statutes. Holland, *op. cit.*, p. 194.

⁵The term "law of nations" has been used in the following cases, possibly others: A Resolution of Congress, May 22, 1779, states that the United States will cause the "law of nations to be most strictly observed," (Journ. Cong. 5;161, Ford, ed. 14;635); Aug. 2, 1779, the United States will pay expenses for all prosecutions in states for such "transactions as may be against the law of nations", (Journ. Cong. 5;232, Ford, ed., 14;914); Nov. 23, 1781, recommends that state legislatures provide for the punishment of offenses relating to violation of safe conducts, breaches of neutrality, assaults upon public ministers, infractions of treaties, and "the preceding being only those offenses against the law of nations which are most obvious, and public faith and safety requiring that punishment should be coextensive with all crimes, Resolved, that it be further recommended to the several states to erect tribunals in each state, or to vest ones already existing with power to decide on offenses against the law of nations not contained in the foregoing enumeration," (Journ. Cong. 7;181, Ford, ed., 21;1137); Dec. 4, 1781, Courts to determine prize cases by "the law of nations, according to the general usages of Europe," (Journ. Cong. 7;189, Ford, ed., 21;1158); Constitution, 1789, Congress given power "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations," (Art. 1, sec. 8, cl. 10); Act, Sept. 24, 1789, District courts given jurisdiction of suits brought by aliens for torts in violation of "the law of nations or of treaty," and the supreme court given exclusive jurisdiction of suits against public ministers "as a court of law can have consistently with the law of nations," (1 stat. 76, sec. 9, 13; rev. stat. sec. 563, cl. 16, 687; Judicial code of 1911, act March 3, 1911, 36 stat. 1087, sec. 24, cl. 17, 233); Act, Apr. 30, 1790, prescribes criminal pen-

may be roughly divided into (1) those defining the jurisdiction of courts, (2) those creating and defining the functions of public officers, (3) those designed to prevent infractions of duty by public officers, and (4) those of like effect in reference to private persons.

(1) The jurisdiction of courts in relation to ambassadors, consuls, and aliens; over offenses against foreign states; and over prizes of war have been prescribed both by the constitution and statutes, often in terms making specific reference to international law.

(2) Statutes prescribing the functions of such officers as ambassadors, ministers and consuls, are of distinct importance in the observance of international law, as also are those giving executive, naval and military officers authority to perform duties required by international law, such as expelling foreign vessels of war which have violated neutral rights, and extraditing criminals when required by treaty.

In these two cases, statutes frequently contain rules of international law itself. When a statute requires a court to refuse jurisdiction of suits against foreign ministers, the rule is one both of municipal and international law.

(3) Statutes frequently provide for enforcing the duties of officers. Naval and military officers and enlisted men are made subject to military law and to civil liability for damages in certain cases. Requirements of bond and amenability to criminal penalties for specified breaches of duty are specified in the case of diplomatic officers and consuls.

alties for assaulting or serving out process against public ministers, in "violation of the law of nations," (1 stat. 117, sec. 25, 28; rev. stat. sec. 4062, 4064); Act, June 5, 1794, authorizes the president to expel foreign vessels in cases in which "by the law of nations" they ought not to remain, (1 stat. 384, sec. 8, Act, Apr. 20, 1818, 3 stat. 447, sec. 9; rev. stat. sec. 5288; Penal Code of 1910, Act, March 4, 1909, 35 stat. 1088, sec. 15); Act March 3, 1819, prescribes punishment for committing piracy "as defined by the law of nations." (3 stat. 513, sec. 5; rev. stat., sec. 5368; Penal Code of 1910, sec. 290); Act, Aug. 29, 1842, permits federal courts to release on habeas corpus, from state courts, persons claiming any right "the validity and effect of which depends upon the law of nations," (5 stat. 539; rev. stat. 703); Joint Resolution, March 4, 1915, authorizes the president to prevent the territory of the United States being used as a base of military operations "contrary to the obligations imposed by the law of nations," (38 stat. 1226).

(4) In the same manner private persons are made subject to criminal prosecution for violating neutrality, for assaulting foreign ministers, for committing offenses against foreign states such as counterfeiting foreign securities, or for committing piracy.

Rules in these two classes are not, for the most part, rules of international law, but rules supplementary to international law. International law does not prescribe the means to be employed by the state in compelling persons under its jurisdiction to observe the rules it lays down, but if they are not properly observed it holds the state responsible. The enactment and enforcement of such rules are therefore of great importance in giving legal sanction to international law. Especially are such statutes necessary in the United States in view of the fact that federal courts have no criminal jurisdiction except in so far as has been conferred by statute.

Statutes defining boundaries, recognizing states, declaring war, making appropriations to pay indemnities, etc., although of great international importance are to be regarded as determinations by congress of political questions. They do not furnish permanent rules for the enforcement of international obligations, although they may recognize specific international duties.

(3) *Executive Orders.*

Executive orders have been, for the most part, similar in character to statutes of the third class. They are supplementary to statutes, generally giving administrative rules in greater detail for the guidance of public officers. Instructions and regulations for diplomatic, consular, naval and army officers are illustrations of rules of this character.

(4) *Judicial Decisions.*

In practice the courts of the United States have given most marked recognition and sanction to the rules of international law. American courts from the earliest time have given voice to the doctrine that international law is law in the United States and must be applied by the courts in appropriate cases. The philosophy basing law on natural rights, so prominent among the founders of the Republic, found expression throughout its constitutional system. There was, it is true, confusion of thought as to the sources of natural law. The voice of the people, as expressed in written constitutions limiting the powers of government, was considered the final criterion by many. The

courts, however, have tended to recognize natural rights, based on precepts of morality or reason, to have legal force, even when not so expressed. Thus while enforcing the authority of constitutions as against legislatures by declaring statutes contrary to them void, they have sometimes expressed the opinion that certain fields of legislation are barred by a higher law, not expressly stated in the constitution.⁶

The theory by which international law is applied by the courts bears a very close relation to this philosophy. In the eighteenth and early nineteenth centuries, international law was often considered a branch of natural law.⁷ If natural law was a

⁶Goshen vs. Stonington, 4 Conn. Rep. 209, 225; Wilkinson vs. Leland, 2 Pet. 627; Terrett vs. Taylor, 9 Cranch 43; Ham vs. McCraws, 1 Bay 98 (S. Car. 1789) Bowman vs. Middleton, 1 Bay 254 (S. Car. 1792); Regents of University vs. Williams, 9 Gill. and J. 365; Mayor of Baltimore vs. State, 15 Md. 376; Benson vs. Mayor of New York, 10 Barb. 244; Robin vs. Hardaway, Jeff. Rep. 109, 113, (Va.); Page vs. Pendleton, Wythe, Rep., 211, (Va. 1793); Quincy, Rep. 200, 474, App. 520, (Mass. 1761-1772); Scott vs. Sanford, 19 How. 393, 556; Downes vs. Bidwell, 182 U. S. 244, 282. The superior authority of natural law was denied in Calder vs. Bull, 3 Dall. 386. English authority for a similar doctrine see, Day vs. Savadge, Hobart, 85, 87; Calvin's Case, 7 Rep. 1; City of London vs. Wood, 12 Mod. 669, 687; Bonham's Case, 8 Rep. 114 a, 4 Rep. 234; Rawles vs. Mason, Rich. Brownlow, Rep. 187, 652. See Doctor and Student, written about 1540, London, 1746, p. 14; Blackstone upholds the superior authority of natural law, (Commentaries, 1;41) but admits later that such laws can not render an act of parliament void so far as municipal law is concerned. (Ibid. 1;91). James Wilson, Works, J. D. Andrews, ed., 2 vols., Chicago, 1896, p. 415; T. M. Cooley, a Treatise on Constitutional Limitations, 7th ed., Boston, 1903, p. 164; J. B. Thayer, Cases on Constitutional Law, 2 vol., Cambridge, 1895, 1;1; A. L. Lowell, Essays on Government, Boston, 1889, p. 169; A. C. McLaughlin, The Courts, the Constitution, and Parties, Chicago, 1912, pp. 63-99; Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation, Philadelphia, 1893, pp. 172, 189, 227, 234. C. G. Haines, The Conflict over Judicial Power in the United States to 1870, Columbia University Studies in History, Economics and Public Law, (1909), 35:16-36; C. G. Haines, The American Doctrine of Judicial Supremacy, New York, 1914, pp. 18-24. C. H. McIlwain, The High Court of Parliament, N. Y., 1910, pp. 97-108.

⁷Pufendorf, (1632-1694), Burlamaqui, (1694-1748), and the modern writer Lorimer derived international law exclusively from natural law. Blackstone takes a similar view, Commentaries, 1;43, 4;36. For other writers in the "natural law school" of international law see Bonfils, op. cit., p. 64; A. S. Hershey, History of International law since the Peace of Westphalia, Am. Jour. Int. Law, 6;30, (1912). For American writers

higher law to which courts must give effect, so was international law, although, in the United States, judicial opinion seems never to have gone the length of holding that it must be applied even when in derogation of express statute.⁸

Chief Justice Marshall always maintained that the courts apply national law alone, but by the regard which he showed for international comity,⁹ and by the stand he took that international law is incorporated into the law of the United States and must be applied unless expressly changed by legislation, he showed the influence of the theory of a higher law.¹⁰

asserting this view, see James Wilson, Works, 1;28,34; W. J. Duane, The Law of Nations investigated in a popular manner addressed to the farmers of the United States," Philadelphia, 1809, p. 7-8. Discussion of "The Influence of the law of nature upon international law in the United States," Jesse Reeves, Am. Jour. Int. Law, 3;547, (1909).

⁸The obligation of courts to apply international law was derived from the theory of natural law in a number of cases of the latter eighteenth century. See *Rutgers vs. Waddington*, Mayor's court of N. Y., 1784, *Thayers*, cases, 1;63; *Res Publica vs. DeLongchamps*, 1 Dall. 111, (Pa. 1784); *In re Henfield*, Fed. Cas. 6360; *Ware vs. Hylton*, 3 Dall. 199. British Prize courts sometimes asserted that they must apply international law even when conflicting with executive orders. *The Recovery*, 6 Rob. 348; *The Maria*, 1 Rob. 350; *Le Louis*, 2 Dods. 239; *The Annapolis*, 30 L. J. Pr. M. and Ad. 201; *Phillimore*, International Law, 3; sec. 436. "In the *Minerva* (circa 1807) Sir J. Mackintosh, then Recorder of Bombay, and acting under a Commission of Prize, spoke of its being the duty of the judge to disregard the instructions, supposing them illegal, and to consult only that universal law to which all civilized Princes and States acknowledge themselves to be subject." Holland, *Studies*, p. 197, citing *Life of Sir J. Mackintosh*, 1;317. See also *supra* p. 147.

⁹*Schooner Exchange vs. McFaddon*, 7 Cranch 116.

¹⁰*Talbot vs. Seaman*, 1 Cranch 1, 37; *Murray vs. The Charming Betsey*, 2 Cranch 64, 118; *The Nereide*, 9 Cranch 388, 423; *The Antelope*, 10 Wheat. 66, 120. The reception of international law into the law of the United States has been based on three theories, or four if we include the one just mentioned which really asserts the authority of a "higher law" superior to international law. These are: (1) International law was part of the common law and was accepted with it. "The first craft that carried an English settler to the new world was freighted with the common law, of which the law of nation was and is a part." J. B. Scott, *Am. Jour. Int. Law*, 1;857, (1907); "It is indubitable that the customary law of European nations is a part of the common law, and by adoption, that of the United States," A. Hamilton, *Letters of Camillus*, No. 20, Works, Lodge, ed., 9 vols., N. Y. 5;89. (2) International law was impliedly received by the terms of the constitution. "The Federal constitution provides that congress shall have power to define and punish offenses against

Throughout the history of the United States, the courts have in theory maintained this view, which was never more emphatically pronounced than in 1900 by the supreme court in the case of the *Paquete Habana*.¹¹ And that the courts have in practice made serious efforts to discover the rule of international law applicable to the case in hand, is indicated by the character of the formal sources of law to which they have habitually turned in rendering opinions upon facts appearing to involve international law. Thus the works of publicists, of which those of Vattel, Bynkershoek, Grotius, Wheaton and Kent are probably the most frequent, have been freely cited.¹² Treaties have been frequently adverted to, as well as statutes and court decisions of foreign countries, of which those of Great Britain are by far the most numerous.¹³ Historical accounts of international

the law of nations and to make rules concerning captures on land and water. Furthermore it is declared that treaties made under the authority of the United States shall be the supreme law of the land. The effect of these clauses which recognize the existence of a body of international laws and the grant to congress of the power to punish offenses against them, the courts have repeatedly held is to adopt these laws into our municipal law en bloc, except where congress or the treaty making power has expressly changed them." W. W. Willoughby, *Am. Jour. Int. Law*, 2:365. (3) International law itself and the privilege of membership in the family of nations, put the courts of the United States under an obligation to apply international law in appropriate cases. "The statesmen and jurists of the United States do not regard international law as having become binding on their country through the intervention of any legislature. They do not believe it to be of the nature of immemorial usage, 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. — — — If they put it in another way it would probably be that the state which disclaims the authority of international law places herself outside the circle of civilized nations." Sir H. S. Maine, *International Law*, N. Y., 1887, p. 37. To similar effect, Phillimore, *op. cit.* 1:78; Secretary of State Jefferson to Genet, French Minister, 1793, *Am. St. Pap. For. Rel.* 1:150; Assist. Secretary of State Rives to Mr. McGarr, *For. Rel.* 1888, pt. 1, pp. 490, 492; Moore's Digest, 1:1-11; See also cases cited, *supra* p. 16, note 10 and statutes cited p. 221, note 5.

¹¹The *Paquete Habana*, 175 U. S. 694, (1899).

¹²Other publicists frequently quoted have been Pufendorf, Rutherford, Wicquefort, Wolf, Halleck, Calvo, Perels, Hall.

¹³On the authority of British prize precedents in United States courts see Chief Justice Marshall in *Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191, (1815). During the Civil war Lord Stowell's prize decisions were relied on almost entirely.

practice have also sometimes been cited as evidence of the rule of international law on the subject in question.¹⁴

The general principles which the courts of the United States have applied in cases involving international law may be summarized as follows: (1) international law should furnish the rule of decision in all appropriate cases where there is no constitutional provision, statute, or executive order, authorized by statute, in direct conflict; (2) treaties are an immediate source of law on a par with statutes, a later treaty overruling an earlier statute and vice versa; (3) statutes and executive orders when appearing to conflict with international law should be interpreted, if possible, in harmony with the rule of international law.

It must always be borne in mind that these rules can only apply to that portion of customary and conventional international law which, by its nature, is applicable immediately to controversies between parties, subject to the jurisdiction of the court. It is therefore of the highest importance to consider what fields of international law the courts consider in this class. Clearly if the court conceived of the bulk of international law as rules prescribing conduct for the sovereign power alone, that is as "political questions", these liberal principles would be of little practical effect.

The view of the courts in this respect can only be inferred from their practice. We have, therefore, given much consideration in this thesis to the question, "From what fields of international law have the courts actually drawn rules for the decision of cases?"

These fields in which international law has been actually applied by the courts may be classified as (1) cases relating to jurisdiction, (2) cases relating to the rights of the inhabitants of newly acquired territory, and (3) prize and maritime cases. By defining the limits of national jurisdiction, according to international law, by refusing jurisdiction of extraterritorial offenses, and suits against foreign sovereigns; by refusing to give extraterritorial effect to laws and by assuming jurisdiction over prizes of war, courts have enforced duties of international law. The same is true where courts have supported vested rights and applied the existing law for the benefit of the inhabitants of acquired territory. In determining prize cases, the courts have in general made a faithful effort to apply international law as

¹⁴In the *Paquete Habana*, 175 U. S. 694, Justice Gray makes extensive citations from all of the kinds of sources mentioned.

their theory demanded, although exception should be made in some of the Civil war cases. So long as international law has to be applied by national tribunals it can not but be warped by its proximity to considerations of policy and the inevitable partisanship of officers, who owe a primary duty to one of the litigant states.

DIVISION OF POWER BETWEEN STATE AND NATIONAL GOVERNMENTS

The division of power between the state and national governments has at times resulted in an inability to perform obligations required by international law. The state governments, not having international relations, and not feeling the pressure of international public opinion, cannot be relied on to enforce duties of international law. It would seem, however, that under the constitution the national government may exercise all powers necessary to make treaties and obligations of international law effective. The difficulty lies in the failure of congress to act, rather than in a constitutional impossibility.

The United States has provided in its municipal law for the enforcement of numerous rules of international law. How completely the field is covered we will not venture to assert. To define exactly what obligations are actually imposed by international law at any particular time is almost impossible. The field of international law is constantly growing. Matters yesterday considered entirely internal to-day entail international responsibility and are regulated by international law. Judicial and administrative officers must therefore take continuous cognizance of the development of international law to insure that they apply it in appropriate cases, so far as compatible with their duties as national officers; and congress must be constantly on the lookout for new international duties which require supplementary legislation to be made effective. The failure to provide such necessary municipal measures does not relieve the state from international responsibility if a breach of international law should occur.

IMPORTANCE OF MUNICIPAL ENFORCEMENT OF INTERNATIONAL LAW

The municipal enforcement of international law is a matter of great importance from the standpoint both of international law and of national policy. There are no administrative or judicial authorities with coercive power except those of territorial states. The growth of international unions and admin-

istrative organs has been rapid in the last few years, but such bodies still rely on states for effectiveness. Power is essential to effective sanction¹⁵ and power is still controlled by states exclusively. Rules of international law can not, therefore, be effective unless enforced by state authorities as municipal law.¹⁶

National policy likewise dictates the provision of municipal measures for enforcing international obligations. Since the Alabama claims arbitration it has been clear that lack of such laws will not relieve the state from responsibility. Liability to indemnity, reprisal or war can only be avoided by a strict observance of international duty, and this observance can in many cases be assured only by adequate provisions of municipal law.

¹⁵Robert Lansing, Notes on Sovereignty in a State, *Am. Jour. Int. Law*, 1;105-128, 297-320, emphasizes the importance of physical power in the sanction of law.

¹⁶Though not incorporated into municipal law, rules of international law may be law in the sense of being rules of great authority generally observed. They would occupy the position which Maine assigns to the Brehon laws of ancient Ireland. "The Law of Distress was clearly enough conceived by the Brehon lawyers, but it depended for the practical obedience which it obtained on the aid of public opinion and of popular respect for a professional caste. Its object was to force disputants to submit to what was rather an arbitration than an action, before a Brehon selected by themselves, or at most before some recognized tribunal advised by a Brehon." Sir H. S. Maine, *Early History of Institutions*, p. 286. See also *ibid.* pp. 52, 252.

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The Life of Jesse W. Fell

FRANCES MILTON I. MOREHOUSE, A.M.

FOREWORD

There are few men in any generation who see their lives in relation to the accomplishment of that generation. Few realize, altho all profess to believe, that appraisal of worth must be according to the proportion of a man's part in the advance of his day; and that all honors and distinctions fall away from men when they stand before the bar of years, to be judged in the stark light of truth as to character and service. All men acknowledge this true, but the men are rare indeed who apply it to their own lives, and make it the basis of their individual schedule of values. Many men assert the immortality of the soul, but few can conceive themselves in any scheme of time which transcends the limits of their own lives; or content themselves to labor without reward, because they believe that in the fulness of time all souls must find full compensation.

In writing the story of a man whose part in the life of his generation might in itself bring him some meed of remembrance, I am nevertheless most anxious that his rare quality of indifference to such rewards as men might give, of steadfastness to ideals not generally held in his day, of faith in ultimate things, should stand out as the true reason for his being brought as fully as possible before men. Here was one who steadily ignored or refused honor and fame, who despised no quiet and unrecognized labor, who was not turned aside from his steady aim by the pressure of circumstance; in short, whose belief in the future was interpreted in all the doings of his busy life. This is the sufficient reason for writing a life of Jesse W. Fell.

FRANCES M. MOREHOUSE.

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CHAPTER I

EARLY YEARS, 1808-1836

The Fell farm in New Garden Township, Chester County, Pennsylvania, lay mainly upon a high ridge, which was known by the Indian name of Toughkenamon, or Fire Brand Hill. It is a region rich in historical associations, not far from Brandywine battlefield. The house was built of stone, and in later years was remodeled into a handsome country residence. Here Jesse W. Fell was born, November 10, 1808. His parents were Friends, of ancient and honorable English lineage, but of limited means and simple tastes. His father was a hatter, his mother a preacher of the Hicksites. Because he had much skill in song, his father, when he later united with the Methodists, became a choir leader; and he sometimes turned his resonant speaking voice to account in crying sales. There was a large family; Jesse, named for his father, was the third child.

When he was eight years old, the family moved to another town in New Britain Township, and subsequently to Downingtown. In the country Jesse attended, with his brothers and sisters, the neighborhood subscription schools maintained among the Friends of Pennsylvania; for there were then no public schools in the state. These schools, within the limited scope of their courses of study, were usually good, and the Fell children received a solid foundation in the elementary subjects. The elder brothers were apprenticed, upon reaching the proper age, to a blacksmith and a wheelwright respectively. As Jesse was not a robust lad, the parents and other relatives thought it best to apprentice him to a tailor, and cast about for a skilful master who might teach him this trade. But the boy himself objected so strenuously that the plan was abandoned. He "would learn a better business," he declared; and his parents, not wishing to coerce him, waited for some definite talent or liking to appear, which might guide their son in deciding upon his vocation. As yet the boy had no plan, save that of becoming wiser than he was. He wanted to go to some school that would teach him more than the country subscription schools offered.

Joshua Hoopes conducted a boarding school for boys in Downingtown at the time, which was the best school in that part of Pennsylvania. It was remarkable in that, at a time when the classics formed the core of instruction in almost all secondary schools, it emphasized the natural sciences. The master was an enthusiastic botanist, a popular lecturer on astronomy, and sufficiently adept at mathematics to win the admiration of his community. These subjects he had mastered by dint of systematic application of his really brilliant mind to printed treatises, and by giving rein to an originality which the higher schools of those days did not greatly encourage. Free from the traditions of schools, this village schoolmaster gave to his boys a type of education destined to become popular afterward, but in other places practically unknown to his own day. He taught of plants and animals, of husbandry and astronomy, of literature and mathematics, with a wealth of practical application which linked books with life and study with pleasure.

Jesse Fell wanted to attend this school but lacked funds. He applied for admission, however, offering to pay for his tuition by any kind of work that he could do. An arrangement was made by which Jesse was to work in the master's kitchen-garden and help about the house in return for his board and tuition. The work was hard, but not unpleasant. His master introduced him to the joy of intelligent gardening, took him for long tramps in the woods, and allowed him the freedom of his library. The books were a mine of riches to the boy, and Joshua Hoopes' enthusiastic love of plant life stirred to response a kindred feeling in the heart of his pupil. There grew out of this pleasant period in the life of the boy that love of trees which, in the man grown, was to give so richly to the prairies of the West.¹

That West continually called him. The idea of going into the new country beyond the mountains grew in him during the two years of his stay at Joshua Hoopes' school. When he had finished the course of study, Friend Hoopes wished him to enter into a partnership with him in a vineyard enterprise which he was then planning. Jesse Fell declined, not being willing to relinquish his dreams of a larger career in a new country; and Friend Hoopes abandoned the scheme "for want of a suitable partner." To further his plan of going west, Fell taught school for a period of about two years, from 1826 to 1828. The schools

¹Richard Edwards, *Jesse W. Fell*, 3.

he taught were near his home, at Buckingham, Colerain, Brown's, and Little Britain. As he understood surveying and other branches of higher mathematics, he was able to command a higher salary than the customary one of two dollars per quarter in cash. In the intervals of teaching he "kept store" for Issachar Price of Callaghersville, while that country merchant was away crying sales; and in all his spare time he was reading diligently.

The two years of teaching were a time of growth and development for the slim, blue-eyed Quaker boy. He tested his powers, enlarged his knowledge, broadened his interests. Altho he later considered himself "but an indifferent pedagogue," he was thought very efficient by those who employed him, except at Colerain. This was an extremely rigid Presbyterian community, with a school in which the New Testament had been the sole text in reading for a long time. Mr. Fell suggested that his pupils bring other books that the reading might be varied, whereupon he was denounced from the local pulpit as a Hick-site who had "expelled the Bible from his school." Without denying the first part of this charge, which was true, Jesse Fell asked that the second accusation might be inquired into officially, and when it was repeated without investigation, he closed the school, very hurt and very indignant.

It was while teaching that he had his first great lesson in the uses of force and diplomacy. A school bully, larger than himself, had defied him and had been whipped. After the whipping he administered a lecture, so tinctured with kindness and well-directed flattery—"what all men like if skilfully applied," said Mr. Fell in telling afterward of this experience—that the boy resolved to reform his ways. He became later a Methodist Episcopal minister of fine character and widespread influence.

At this time, also, Fell began to speak in public, and especially to debate whenever opportunity offered. At the little country school-houses there were held political debates, as well as other neighborhood meetings; and at these debates Fell, when he was only seventeen years of age, made for himself a name as a speaker, particularly upon the tariff, that subject so dear to the Pennsylvanian.²

²The principal source of information for Fell's early life is the unfinished manuscript biography begun by Richard Edwards from notes dictated by Mr. Fell, and already noted. It is among the *Fell MSS.*, as are all papers, not otherwise placed, in the following pages.

In the fall of 1828, having saved a little money and borrowed more from his brother Joshua, Jesse Fell started for the West. He was twenty years of age, still slight and rather frail in physique, and unacquainted with the world. He was going to seek his fortune in an unknown country, with no definite trade or profession as an asset. His family, with a helpful confidence in his ability to do what he wished to do, bade him godspeed. He spent the last night before starting for the West with a dear friend, R. Henry Carter, with whom he talked far into the night, of old days and days to come. In the morning he set out for Pittsburg. A young man by the name of Drummond, from Washington, started with him, but soon became discouraged and returned to his home.³

This first stage of the journey was accomplished on foot, except for a few miles at the end, when, very footsore, Fell wavered in his resolve not to spend his money until he was started upon the farther pilgrimage. He entered Pittsburg upon the deck of a little canal boat. This city was then the clearing house of all western enterprise, the gateway to the new land, and a center for securing employment. Here Jesse Fell met a Mr. Reese, who employed him as a book agent. He was to take orders for Malte Brun's *Geography*, Rollin's *Ancient History*, Josephus' works, and one other book, the name of which Mr. Fell afterward forgot. Armed with this means of defraying expenses, he boarded a steamer for Wheeling, where he soon fell in with a certain Mr. Howell, the publisher of the *Eclectic Observer*. Mr. Howell conceived a fancy for the young Quaker, and wished to interest him in his paper. This was a journal of protest against slavery, capital punishment, and any other institution which, in the eyes of the editor, deserved censure. Jesse Fell again decided against the half-gods; he was bound for the newer and greater West.

While canvassing Wheeling, however, he found time to write his first contribution to a periodical. The subject was one upon which he had often grown eloquent in the country school debates of Chester County: "The Abolition of Imprisonment for Debt." Howell was delighted with its force and fervor. Here was material worth the working—what an abolitionist he

³R. Henry Carter to E. J. Lewis, Mar. 8, 1887. Grace Hurwood to Fannie Fell, Mar. 16, 1913. The latter includes notes of facts related to Miss Hurwood by Mr. Fell. Franklin Price in the *Fell Memorial* (MS.), 9-10.

would make! He offered him an assistant editorship. But Fell declined, and went on with his own plans. They carried him, with his books, over the National Road, opened at that time as far as Zanesville. He met interesting people on the road, notably the Honorable Benjamin Ruggles, United States senator from Ohio from 1815 to 1833.

But the people along the National Road, being busily engaged in making homes in the wilderness, had no great thirst for Josephus and Rollin. Mr. Fell perceived that the business of selling books would give him no very speedy or considerable help in winning his way to the West. An illness took his small savings. Consequently, as the winter of 1829-30 drew near, he made his way back to Wheeling, where he spent the cold months in Mr. Howell's office, setting type, writing for the *Eclectic Observer*, and learning the tricks of a literary trade. At this time he asked his father for money to invest in a part interest in the *Amulet*, for which he had been agent. Very fortunately, as he himself said afterward, his father was not able to help him at that time, and the idea of this partnership was given up.

When the spring returned, he set off again with his books under his arm, up the Ohio and toward the north, through the counties of Jefferson and Columbiana (where were people of his own religious faith, upon whose friendly interest he might confidently depend), and back to Pittsburg, the headquarters of his book house. Throughout the journey he had kept a notebook, which was later lost. The uncertain fortunes of a traveling agent, his illness of the year before, and the knowledge of the world which his experience was giving him, crystallized what had before been but a vague ambition into a settled determination. He would prepare himself for a profession, which in those days even more generally than at the present time, led to honor, influence and power. He would be a lawyer.⁴

With this resolution in mind, but with his agent's paraphernalia still in hand, he turned his face westward again in the spring of 1830. He had gone as far as Steubenville when the event occurred which was to prove the means of accomplishing his desire. Walking along the sidewalk with an agent's ready eye for a possible buyer, he espied a young man busily

⁴Elwood Brown to Jesse W. Fell, Dec. 20, 1829. Jesse Fell to Jesse W. Fell, Jan. 16, 1830. Hannah Fell (an aunt) and Rebecca Fell (his mother) to Fell, Feb. 6, 1830.

chopping wood. He looked not averse to good reading, and the agent approached him in the interests of Josephus, Rollin, and Fell. But the woodchopper was as poor as Fell himself, and the two, finding a common interest in their common situation, fell to discussing ways, means, and prospects. The woodchopper was studying law, he said, in the office of a local firm of excellent reputation. He would like to buy books, but needed every cent he could make for bare living expenses. After he had been admitted to the bar, he was to pay for his tuition; and then he would need all surplus funds for his law library. There was a place for one more student with Stokeley and Marsh, and he would introduce Fell to the firm.⁵

Fell soon made arrangements for his law course. He was to pay his way in part by doing office work for the firm, and partly by such odd jobs as he might find to do in that frontier community, where there was usually work for all. His two elder brothers helped him from time to time as their limited means permitted. Stokeley and Marsh soon came to value him very highly, while he regarded both the partners with the greatest affection. About a year after beginning his studies in their office, he made a visit to his old home, and was present at the wedding of his brother Joshua, on January 16, 1831. On the return journey his father brought him as far as Shippensburg, a point some forty miles west of Harrisburg.

For another year the law lessons in the office of Stokeley and Marsh went on. The young men in the office had practice in public speaking, for they were eligible to membership in The Forum, a society whose object was the improvement of its members "in speaking and general culture". Jesse Fell made his first speech before this body upon his old theme of the abolition of imprisonment for debt. The presiding officer, a Mr. Wright, who had been a congressman and was later a judge, praised his speech; and Fell tried again. Mr. Stokeley was a local leader in the ranks of the Whigs, who were at that time actively opposing Jackson. There were innumerable stump

⁵Fell to Jesse Fell, June 26, 1830. The story as told by Edwards implies that the idea of becoming a lawyer did not occur to Fell until the time of his interview with the woodchopper. But a letter to his parents, dated June 6, 1830, indicates that the idea had been with him for some time; while Franklin Price states (*Fell Memorial*, 9) that he had read Blackstone while still in Chester County.

speeches to be made, and Mr. Stokeley gave to Jesse Fell his share in the work. The younger man conceived a great admiration for Henry Clay, which guided his political opinions and activities while Clay lived. A youth working in Trumbull's bookstore, and at that time a Clay enthusiast with the rest, became his friend. This boy was Edwin M. Stanton, afterward secretary of war under Lincoln.

The autumn of 1832, when Jesse Fell was preparing for his bar examination, was an especially busy season. He took these examinations, with three other aspirants, on the first of October, passed them successfully, was admitted, and started on foot for the West about a fortnight later.⁶ It was a somewhat risky enterprise, for the payment of his debts took most of his money, leaving very little for the outfit and for traveling expenses. His family helped him as they could, but this was not much. Mr. Marsh, regretting to lose a youth who gave so great promise, had offered him a partnership if he would stay with him, his own partnership with Mr. Stokeley having recently been dissolved. Again Fell chose to answer the call of the ultimate mission. His plan was to travel through parts of Ohio which he had not yet visited and through Indiana and Illinois. He seems not to have thought of settling at once, as he suggested to his father at the time that he "might return by steamboat from St. Louis, as this may be done with little expense." He seems also to have left with Mr. Marsh the idea of possibly returning to enter into a partnership at a later time.

Traveling on foot through Ohio and Indiana, Mr. Fell came to Eastern Illinois in November, 1832. The presidential election had been held the day before he entered the state. At Danville he met Judge McRoberts, a prominent citizen of those days, who told him of a village then but lately founded, named Bloomington. Its location Judge McRoberts thought good; it was a "coming" town. In Decatur, the next considerable place which Fell visited, this report of Bloomington was repeated. At Jacksonville, Judges Lockwood and Smith made out for him his certificate of admission to the bar of Illinois.⁷

In Springfield Fell was to talk to John T. Stuart, to whom he had letters of introduction, and whose advice he wished be-

⁶Certificate of admission to Ohio Bar (James Ross Wells, clerk), dated Oct. 13, 1832. Fell to some member of his family, Sept. 23, 1832. Jesse or Rebecca Fell to Fell, Sept. 2, 1832.

⁷Nov. 1, 1832. This certificate is also among the *Fell MSS.*

fore deciding upon a location. At sunset of a warm day in late November, he arrived in the city which was afterward to be the capital of Illinois. John Todd Stuart was sitting before the door of his house when Fell approached, carrying the stout stick and carpet-bag which were his worldly possessions. Many young men so accoutred trod the streets of the new cities of the West in those days, and Stuart with a characteristic friendliness spoke cordially to this newcomer and asked him what he might do for him. Fell answered that he was looking for John T. Stuart, and would like to be directed to his house. Upon learning that he was speaking to Mr. Stuart, Fell produced a letter from one of Stuart's clients in Philadelphia, introducing the Pennsylvanian and asking the favor of advice and help for him. The two men sat down then and there to discuss the question of location and opportunity.⁸

Mr. Stuart spoke especially, as had Fell's previous advisors, of the new county of McLean, lately created by the legislature, and its county seat of Bloomington. It was, he said, a very new town, and he was quite sure that there was no lawyer there as yet. With the quick decision which was one of his characteristics, Fell determined to go at once to Bloomington, and rose to depart. Stuart invited him to stay the night, but so eager was Fell to reach his destination, that he declined the proffered rest and entertainment, and trudged that night many miles on his way to Bloomington. At New Salem, pausing for food and rest, he first heard the name of Abraham Lincoln, when the townspeople told him of the company they had sent to the Black Hawk War. From there he went to Pekin, and then sixteen miles farther to Dillon, since called Delavan, in Tazewell County. Here he stopped to visit at the home of William Brown, members of whose family he had known in Pennsylvania. He was almost without money, but came "carrying a knapsack and feeling as big as King Solomon in all his glory," and full of that buoyancy and faith in the future which made him both representative and leader in his day and place.⁹

William Evans built the first house in Bloomington in 1826. Four years later, on the twenty-fifth of December, 1830, McLean County was created. The first sale of town lots was on July 4,

⁸These facts were related to the writer by Judge James Ewing of Bloomington, Dec. 4, 1912. Mr. Stuart had himself told them to Judge Ewing. See also Fell to David Davis, Dec. 16, 1885.

⁹Joshua Brown to E. J. Lewis, Dec., 1896.

1831. At the close of 1832 the town numbered about one hundred people, while the neighboring settlement of Blooming Grove had fully two hundred and fifty. General Gridley, lately returned from the Black Hawk War, was the leading citizen. When Jesse Fell arrived, William Evans had but lately sold his house to James Allin, who opened a store in it, and laid out the town in lots. There was no resident clergyman at that time, no newspaper, and no lawyer.

Fell's survey of the situation satisfied him that there existed a favorable opening for him, and he returned to Delavan, where William Brown offered him employment for the winter as a tutor to his children. Mr. Brown was the great man of his locality—a man who had glass panes in the windows of his cabin, whose family had “come west” in a carriage, and who employed a teacher to instruct his children. He had brought his family from Pennsylvania in 1828. Later, he became known in central Illinois as “Joseph,” because in a year of crop-failure he had sold his good crop of corn for a dollar a bushel, the normal price of grain in early days in Illinois. People for many miles around came to him for food and seed. His home was a social center. From it the young people started on long rides to lectures or parties at Pekin or at distant farmhouses and settlements. The eldest son, Joshua, was the leading spirit among the younger men. Eliza, the eldest of the sisters, was a girl of rare loveliness and ability, whose early death a few years later brought great sorrow to the whole neighborhood. The children of two other families attended Jesse Fell's classes that winter. In the Brown home he found congenial friends, encouragement, and good counsel, as well as the material help he needed.¹⁰

When the spring came he went back to Bloomington, and opened his office in a small brick building at the northeast corner of Main and Front streets. The small legal library, which Mr. Marsh had agreed to send him when he was located, to be paid for when practice gave him means, arrived during the spring, after a long journey down the Ohio and up the Mississippi and the Illinois to Pekin, whence it was carted overland to Bloomington. Fell boarded with James Allin, who, in addition to his other activities, kept the only inn of that locality, at what came afterward to be known as “the old Stipp place.”

With the growth of population and the inevitable troubles

¹⁰E. M. Prince, “Hester Vernon (Brown) Fell”, in *Historical Encyclopedia of Illinois and History of McLean County*, II, 1024-27.

in adjusting titles and claims to lands, there came legal business in plenty to Bloomington's first lawyer.¹¹ On the second of May, 1833, he made his initial appearance in an Illinois courtroom. This was at the third session of the Circuit Court in McLean County, which sat for three days, and disposed of several cases. Fell was attorney in two of these cases, securing favorable judgment in both by default. At the next session, in September, he had a number of cases, which he managed so well that his position and clientele were henceforth assured.¹²

John T. Stuart continued to be his friend, furnishing him letters of introduction and recommending him to clients. He became known as a good judge of land, and located innumerable farms for his clients, making the entries at the land office in Danville. Before long he began to acquire land for himself, and to exhibit the outward and visible signs of prosperity. He bought

¹¹John T. Stuart told Judge James Ewing that when he attended court in Bloomington six months after Fell had settled there, Fell told him he was worth about \$60,000 above all debts. The statement is manifestly inaccurate, as to the time of the occurrence; but it gives some idea of the rapidity with which fortunes were built up in the prosperous days of the early land-exchange. Fell was "worth \$60,000" in 1837.

The first professional card used by Mr. Fell gives as references the following lawyers: Richard Dorsey, Baltimore; William Dorsey, Richard Sturgeon and Amos Jeans, Philadelphia; William P. Dixon, New York; Willis Hall, Albany, New York; D. B. Leight and Company, Louisville; Hon. John C. Wright and Hon. Samuel Stokeley, Ohio; and Hon. John T. Stuart, Illinois.

¹²The first session of Circuit Court in McLean County was held Sept. 22, 1831, at Mr. Allin's house, but with no docket; at the second, held Sept. 27, 1832, the jury tried one appealed case, dismissed several on the docket, and continued one. Record 1, Circuit Court, McLean County, 1-14. Fell to his parents, Nov. 17, 1833.

An incident related by Fell to Miss Grace Hurwood, and repeated from her notes in the letter of March 16, 1913, referred to elsewhere, goes to show that although a Quaker, Fell was not averse to defending himself in traditional ways. He and another young lawyer became engaged in an altercation in which his opponent accused him of lying. "I told him that would have to be settled outside the courtroom, so when court adjourned, we promptly went out to settle it in the time-honored way. Neither of us gained much advantage over the other, as while he was the stronger, I was the quicker, and we were parted before we could finish. We had fought hard enough however to be willing to shake hands. In the morning we were indicted for fighting 'to the disturbance and alarm of the people'. My defense was that nobody was at all alarmed, much to Lincoln's amusement, and the indictment was quashed."

his first horse, McLean, on which he took those long night rides to Danville, Springfield, Urbana and Vandalia, that soon began to tell sadly upon his health. His restless energy responded to the insistent demands of a growing, changing, developing country. Some prophetic idea of its possibilities, and much boyish eagerness to realize his dreams speedily, urged him to an activity which was the continual wonder of all his friends. He was interested in everything that promised to help the country of his adoption, and developed early that loyalty to Bloomington and McLean county which characterized him in so much that he did.

An instance of this loyalty to Bloomington occurred early in his career. In 1834 an effort was made to take from McLean County its territory west of the third principal meridian, and add it to Tazewell County. This would have made the western boundary line of McLean County scarce eight miles from Bloomington, thus changing its central location to a western one, and so furnishing a possible reason for removing the county seat to another town at some future time. Mr. Fell opposed the movement valiantly from the first. Fearing that its friends might push the measure through the legislature if that body were left unguarded, he spent most of the winter of 1834-35 in Vandalia, where his efforts and influence were such that the project failed of realization. McLean County owes to him, consequently, and to those who worked with him, the distinction of being the largest county in the state.¹³

The winter in Vandalia had results other than the preservation of the territorial integrity of McLean County. John T. Stuart of Springfield and Abraham Lincoln of New Salem were both at that time members of the legislature from Sangamon County. The two men roomed together, and Jesse Fell lived in the same house. These men were very interesting to the easterner, who noted the sharp contrast between Stuart's attractive person and polished manners and Lincoln's big-boned, angular, wrinkled face and direct ways. Stuart introduced Fell to Lincoln, and the two became almost at once great friends, for there was in them a fundamental likeness which transcended all differences of creed, training or destiny. The friendship of the trio lasted to the death of the president in 1865, and was cemented by much mutual service. In 1838, when Stuart was a candidate for Congress against Stephen A. Douglas, both Fell

¹³Fell to David Davis, Dec. 15, 1885. Lewis, *Life*, 3. Lawrence Weldon, "Memorial of Jesse W. Fell" in *Fell Memorial*.

and Lincoln exerted themselves to the utmost to insure his election. Douglas and Fell also, in spite of the vigorous opposition of the latter on this and other occasions, were good friends, serving each other in many ways with the greatest cordiality.¹⁴

Mr. Fell almost immediately, in spite of his youth and inexperience, seems to have become a leading citizen. This was partly due, of course, to the fact that he was Bloomington's first regularly trained and capable lawyer; but it must also have been largely owing to innate qualities of leadership and to that singular charm and adaptability to which many of his generation have borne witness. In 1833, Benjamin Mills wrote to him asking for support for his candidacy to represent the third congressional district in the next Congress. He interested himself in securing a mail route from Bloomington to Springfield, concerning which Governor Joseph Duncan wrote encouragingly in the spring of 1834. He was in requisition for Fourth of July orations, citizens' mass meetings, and debating-clubs. In 1834 he became, by appointment, commissioner of school lands for McLean County. The county records of that and the succeeding year show many mortgages which he drew up with the school money, both for town lots and for farms. The last of these was made in October of 1835.¹⁵

Early in that year the state legislature chartered the State Bank of Illinois, of which Mr. Fell became an agent. This institution consisted of a "parent bank" at Springfield, with branches scattered over the state, and had a capital of one and a half million dollars. During 1835 and 1836 the bank made seventy-seven mortgages in the city and vicinity of Bloomington, to most of which Fell's name is signed as witness to instrument. The bank passed out of existence in February, 1842, having sus-

¹⁴Fell to Lincoln, July 20, 1838. Lincoln to Fell, undated, about July 25, 1838. Douglas to Fell, March 21, 1844.

¹⁵School money in Illinois was at this time unappropriated to its ultimate use. Benjamin Mills to Fell, Feb. 22, 1833. (Mills was opposed in this election by W. L. May, another personal friend of Fell.) Joseph Duncan to Fell, Apr. 4, 1834. The manuscript of a Fourth of July oration, delivered in 1833 or 1834, is interesting in that it contains, besides the usual congratulatory and patriotic sentiments, a strong plea for free public schools. Fell delivered this same oration again in Clinton many years later, at which time he noted the presence of two or three Revolutionary soldiers.

pending specie payment in May, 1837, with its bills at fifteen per cent discount.¹⁶

The records of these and other enterprises show that by 1840 Fell had become a man of position and prominence in Central Illinois. He was known chiefly for his dealings in real estate, and of these it is meet to speak more fully.

¹⁶N. H. Ridgley to Fell, Oct. 30, Nov. 2, Nov. 6, Nov. 13, 1835; May 3, 1836. E. J. Phillips to Fell, May 10, 1836. Ridgley to Fell, Oct. 11, Oct. 29, Nov. 18, 1836. Phillips to Fell, Nov. 26; Ridgley to Fell, Oct. 26 and 29, 1836. See Thompson, "A Study of the Administration of Governor Thomas Ford," in *Governors' Letter-Books, 1840-1853*, xii-1, (*Ill. Hist. Col.* VII); Ford, *History of Illinois*, 191 ff.

CHAPTER II

BUSINESS VENTURES AND HOME LIFE, 1834-1856

The preëmption law of 1830, practically reenacted in 1834, provided that when two men settled on the same quarter-section of government land, each of them might preëempt an additional eighty acres anywhere in the same land district.¹ These claims were called "floats." Many poor men were induced by capitalists to lend their names for floats, later to sell the claims so acquired for enough to pay for the land they lived on. In this way many hard-pressed pioneers were enabled to gain a title to their farms, while such land-buyers as were shrewd enough and had the requisite ready money, secured much fine land in Illinois during the '30's. Mr. Fell, who first visited the village of Chicago late in 1833, afterward remarked to friends that land in that locality might be secured in this way, and that it would be a paying investment, as a great city would eventually stand on the lake-front at that point. His friends laughed at him, as much of the land for which he prophesied immense future values was covered with water during most of the year.

But one man in Bloomington, William Durley, declared that he believed Fell right in his estimate of Chicago's future, and loaned him money for real-estate operations there. He demanded a high rate of interest as compensation, or if he preferred it when the time of settlement came, half of the land. With this money Fell secured four floats in the fall of 1834, the land being within the limits of the present city. When the notes were due, Mr. Durley chose half the land as his share. Part of the two "eighties" which came to him, Fell laid out in town lots.² The rest of the land he sold to David Davis, Dr. John An-

¹21st Cong. Sess. I., *Acts of the United States*, Chap. 209, § 2. (May 29, 1830.) 23rd Cong. Sess. I., *Acts of the United States*, Chap. 54, §§ 2-3. (June 19, 1834.) Treat, *The National Land System, 1785-1820*, 306, 386. Fell to his parents, Nov. 17, 1833.

²Lewis states (*Life*, 26) that they comprised "Fell's addition to Canalport". The property lies between 26th and 31st streets, and west of the tracks of the former Pittsburg, Fort Wayne and Chicago R. R. (now part of the Pennsylvania System).

derson, James Allin, M. L. Covell and O. Covell for eight thousand dollars, taking their notes for the amount. After the crash of 1837 he took back the land and surrendered the notes at the earnest entreaty of the purchasers. His purpose was to hold the land for the advance which he knew would follow when better times had restored confidence. But altho he held out against the storm longer than many, his liabilities were such finally that he had to sacrifice even this resource. He mortgaged the "eighties" for eight hundred dollars each, the mortgages being foreclosed by David Davis and others.³

While he owned land in and around Milwaukee, Fell was much interested in the development of that city and of the state of Wisconsin. Governor John Reynolds, writing to him from Washington in 1836, sent the pleasant news of assured federal aid for a lighthouse in Milwaukee harbor, a survey of the harbor, and a "road to start from that point running west to the Mississippi." William L. May, having been elected to the National House of Representatives, attempted at Fell's earnest solicitation to secure a post-office at Chippewa, but failed, because Chippewa was then still in the Indian country. Fell owned lands "up the river from Cassville" in Wisconsin, in 1837, and made an inspecting tour among the Indians in "the pine country" in the autumn of that year.⁴

But these operations in real estate in places far distant from his own home, were insignificant when compared with Fell's part in the development of Central Illinois. Gaining a reputation as a judge of land in connection with his business of locating tracts for settlement and investment, and becoming thoroughly acquainted with the topography of the country and with land values, through his work of loaning school funds and State Bank funds, he entered early into extensive operations in Illinois lands for himself and others. He had great faith in land. When a boy, spending unhappy hours picking the stones from the rocky farm in Pennsylvania, he had dreamed of the prairie, and

³Lewis, *Life*, 25-27. Fell was at this time unable to borrow money of Eastern capitalists, while Davis had friends from whom he secured the funds. William L. May to Fell, Feb. 28, 1838.

⁴John Reynolds to Fell, June 28 and July 6, 1836. (Reynolds was financially interested in the lands dealt in by Durley and Fell.) Fell to Hester Vernon Brown, July 30, 1837: "from the Plain River, Cook County, Wisconsin." Fell to Wm. Brown, Aug. 24, 1837.

wished that he might own farms in the land where, travelers said, there were no stones in the fields. He was in a position, during those halcyon years between his arrival in Illinois and the great panic of 1837, to satisfy this early ambition. He did so on a scale which only the low land values and the easy speculation of the day made possible. He was one of a generation of men of large faith and far vision, who believed in their states, who foresaw the empire of the West that was to be, and who supported their faith by generous investments. There were, besides men of such a stripe, any number of mere adventurers, wildcat speculators, who also contributed to the false feeling of security and prosperity that preceded the panic of 1837. The General Assembly, in 1836 and 1837, entered into an ambitious series of internal improvements, which while it saddled the state with a debt of more than fourteen million dollars, was nevertheless a strong stimulant to progress. The period was one of rapid development. Merely to have been upon the market, to have been bought and sold, to have a price, gave value and prominence to the western lands and to western enterprise. When in addition to this towns were founded and eastern people settled upon the prairie farms, when mail routes and railroads were projected and built across the wastes that separated the frontier cities, when schools and churches and shops gave to western life an approximation of conditions "back East," the goal of the builders of the West seemed in sight.⁵

In this work of nation-building Jesse Fell had no small part in that region which he adopted for his home. He worked mainly in Central Illinois, with Bloomington as a center, but branched out wherever opportunity offered. Clinton was among the first towns in which he became interested. He founded the town, with James Allin, in 1835, naming it for DeWitt Clinton. Mr. Fell had entered a goodly amount of land about the site of his proposed town before laying it out, and made a handsome profit from the sale of town lots. The town owes to him, as did all the places where he had a chance to plant, its early growth of trees.

Fell did not escape paying the price for what he accomplished. His restless energy led him to overwork, and in June,

⁵Mail routes were established by Congress in response to petitions from citizens of the localities to be served. In 1838, for instance, the people of McLean and Tazewell counties asked for a mail route from Bloomington to Lacon. It was not granted at once, but came after some delay. Richard M. Young to Fell, Feb. 21, 1839.

1835, he became very seriously ill. He was in Chicago at the time of his seizure, on the twenty-third of the month, and started on the next day for Bloomington, hoping to reach his friends before the malady developed into one requiring constant care. He succeeded in reaching the home of Dr. Gaylord at Oxbow Prairie in Putnam County, where he was taken in and cared for while he lay helplessly ill for three weeks. At the end of that time he was placed in a carriage and taken to Bloomington, not without further injury to his health, and was unable to attend to his usual duties until about the end of July. Early in August, however, he made a long trip to St. Louis, stopping at the Brown home in Delavan on the way. He himself attributed his illness to exposure and overwork, explaining to his family that in the six months preceding it he had ridden not less than five thousand miles, going sixty, seventy, eighty, and even eighty-five miles a day. These journeys, he further pointed out, he had made in every kind of weather, hot and cold, wet and dry, swimming his horse through streams and afterward riding in wet clothes for hours, and making long rides at night. But the end for which he had endured these hardships was by that time gained, and he registered a vow never again to abuse his health and strength in this manner. He had made, he said, not only what he himself needed, but also a surplus with which to aid those who had long aided him.⁶

Having thus earned a rest, in the autumn of that year he went back to his old home for the first time since settling in the West, stopping on the way for a visit at the home of his brother Thomas in Lancaster, Ohio. In Pennsylvania he suffered a return of his former illness, lying ill at his brother Robert's in Little Britain for over a month. In the spring of 1836, however, he was back in Bloomington, not only looking after his own interests, but planning for his brother Kersey. He had entered land for his brother Joshua during the preceding year, and this was deeded to him in May, 1836. Kersey Fell, after a period of clerkship for Covell and Gridley, was made clerk of the newly erected DeWitt County with power to organize it. He was later admitted to the McLean County bar and practised for many years in Bloomington. Thomas left Ohio for the same place after his brother's visit in the autumn of 1835. Rebecca Fell, a

⁶Fell to some member of his family, Aug. 3, 1835. When Kersey Fell arrived in Bloomington the next spring, he was told that his brother was "one of the richest men in town". Lewis, *Life*, 25.

favorite sister, was being educated at Kimberton Boarding School, and later became a teacher in McLean County.⁷ In 1837 all of Fell's family who were not already in the West came to Bloomington, where they made their home subsequently.

Two years after his family had followed him to Illinois, Mr. Fell married Hester Vernon Brown, a daughter of that home which had first welcomed him to the West. She had been "finished" at a boarding school in Springfield since the days when Fell had been tutor in the Brown home. Rev. Nathaniel Wright of Tremont, a Universalist clergyman, performed the marriage ceremony, for both bride and bridegroom had become somewhat liberal as to Quaker ways and Quaker customs.⁸ The wedding day was January 26, 1838. Mr. Fell's parents were not present, but his sister Rebecca and his brother Kersey attended, and his close friend David Davis was best man. Joshua Brown, brother of Hester, who was also a friend much valued, came to the wedding from his home in Edwards County, and afterwards helped to move the household goods into the cottage that Mr. Fell had built in Bloomington. This cottage, later enlarged by many additions, was on the land which Fell subsequently sold to David Davis. In the accomplishments of Jesse Fell his wife had no small part. She was a notable "manager," in the comprehensive sense in which that word is used in speaking of housewives. She was courageous, capable, and independent. In her own home and in the community she seconded the efforts of her husband with sympathy and ability. Outliving him by twenty years, she was privileged to carry out some of the plans which he himself had left unfinished; and in the same time she demonstrated the force of her own personality, which for so many years she had chosen to make second to his.

After the first few years in Bloomington Fell neglected his law practice in favor of the more congenial work of buying and

⁷*McLean County Historical Society Transactions*, II, 35. Fell to Hester V. Brown, Feb. 28, 1837. Rebecca Fell to Fell, Nov. 20, 1836. In this letter Fell's sister expresses the greatest love for and gratitude to him. It is finely written and quaintly composed, but unbends in places to a degree of childish carelessness and even to one faint suspicion of slang. Other letters, models of an art carefully taught in girls' boarding schools of that day and showing both strength of character and an irrepressible sense of humor, are dated June 10, Sept. 25, Oct. 23, and Christmas, 1836.

⁸Rachel Sharpless (a great-aunt) to Hester Brown. Undated, but about 1836.

selling land. In 1836 he sold out both books and practice to David Davis, altho he continued to use the same office with him for some time. Davis had come from Maryland in the autumn of 1835, and settled in Pekin. The chills and fever of the early prairie days so sapped his strength that he had about decided to leave Illinois, when Jesse Fell, alert for a good lawyer to whom he might turn over his now burdensome practice, persuaded him to go to Bloomington. He offered his own books, office and whatever financial aid might be necessary, as an inducement; and kept through a long life his promise of friendship and help. With the practice and office, Fell sold him several hundred acres of land, at the prevalent price of eight dollars per acre, and this land became the nucleus of Davis' subsequently considerable fortune.⁹

His real estate and other business took Fell frequently to the eastern cities. In 1841 he made such a trip, of which interesting details are to be found in various letters. Bidding his wife good-bye at Pekin, whence she went to her father's home with her son Henry, to stay until her husband's return, he boarded the *Glaugus* for St. Louis. There he waited from Monday until Wednesday for a boat to Cincinnati, taking then the *Goddess of Liberty*, which he declared "a splendid boat," and which reached the city on Sunday evening. On Monday morning he took passage in the *Tioga* for Wheeling, thence by stage to Baltimore, where he arrived June 20, 1841. Two days later he was in Washington.

In that city he met, in the House of Representatives, his old preceptor and friend, General Stokeley of Steubenville. He interested Stokeley in the manuscript of a book he had with him, which had been copyrighted in March; and the two men arranged for its publication. It was a digest of laws and forms relative to real estate, evidently intended to be used as a reference or text book. No further reference is made to it after 1841, and it was never published. Fell wrote to his wife at the time that he had secured favorable attention from some of the best

⁹The *Bloomington Observer and M'Lean County Advocate* of April 22, 1837, contains the professional card of "David Davis, Attorney and Counsellor at Law. . . Office on Front street, with J. W. Fell, Esq. . ." The same newspaper contains the card of Thomas Fell, vendue crier. Fell in the *Pantagraph*, June 29, 1886.

lawyers in the country concerning it. "We think we shall be able to make some money out of it," he added.¹⁰

Jeremiah Brown, a member of the House, was another old friend whom it was a pleasure to greet. The Westerner found much entertainment in visiting sessions of Congress, and wrote his wife faithful accounts of what he saw there. Clay had introduced his bank bill, which many thought would pass, "although some fear." Fell heard him make a strong plea for it, which, he wrote home, was "a great effort;" he still thought Clay a very great man, but had decided that noted men are in general like others—"distance lends enchantment . . ." "I yesterday visited the President and Post Office Department—and had a couple of local postmasters dismissed. The President [Tyler] is a clean, good sort of man—but 'ugly as sin.'" He predicted the creation of a national bank, the repeal of the sub-treasury law, the distribution of the proceeds of the sale of public lands, a slight modification of the tariff—events that any loyal Whig might easily persuade himself that he saw upon the political horizon.

From Washington he returned to Baltimore, and took passage in a steamboat down Chesapeake Bay to the eastern shore of Maryland, where he visited Frank Brattan, an old Bloomington friend. Returning to Baltimore, he went the next day to Philadelphia, noting the fact that it required but five hours to go a hundred miles. In Philadelphia he was most impressed, to judge by the space given to the matter in one of his punctiliously frequent letters to his wife, by a new "bonnett" being worn by the Quaker girls of that city. "I have concluded," he wrote her, "when I get ready to start home to buy thee a Bonnett, if I can muster money enough to spare—of a very pretty fashion lately introduced. If I get one I will get the *materials* to make some more of the same kind. . . . I have almost fallen in love with the Quaker bells of Chestnut Street on account of their pretty bonnetts. Not perhaps entirely on account of their bonnetts either—but because they are in the *first place* in *themselves* very pretty—and *secondly* because their dress and deportment is so

¹⁰The complete title: *Digest of the Statute Laws of the States and Territories of the United States concerning the promissory notes and bills of exchange—the limitations of actions—the conveyance of real estate and the appropriate modes of authenticating deeds, devises, letters of attorney, etc.* Copyright Office Records, U. S. D. C. MISC., March 6, 1841; District of Illinois. Fell to his wife, June 22 and July 6, 1841.

neat and modest. Of all the city girls in the world commend me to the Philadelphians." He promised his son Henry books and toys in the same letter.

During his stay in Philadelphia, besides attending to the business which had taken him to the East, he visited a close friend, Joseph J. Lewis, at Westchester. The return trip was made by way of New York City and the Great Lakes. Fell expected to reach his home by the first of August or thereabouts; there is no record of the exact date of his return. The details of this trip to the East have been given with some degree of fullness, not only because they serve to illustrate many of Fell's interests, but because this was the first of many similar journeys; for until old age forced him to limit his activities, he made one or two trips to the Atlantic seaboard each year.

The real estate business, indeed, entailed far more absence from home than suited Fell, but it also took him much into the open, which was with him a strong consideration. Its financial returns were greater than those of law practice, and it brought him into constant contact with many men, and with the very heart and spirit of the growth of the West. But the panic of 1837 put a stop to real estate operations, as to all other business. Fell lost all that he had gathered together, and was compelled to take benefit of the bankruptcy law of 1841. Surrendering all his lands, he was discharged from his indebtedness (which was later entirely repaid), and began again, as penniless as when he first came to Illinois in 1832. As the bankruptcy court offered much business for lawyers, he took up his old profession again, reluctantly but with marked success. The sessions were held in the United States court at Springfield, and the work brought Fell again into his old strenuous habits. He invariably prepared his cases in Bloomington, that he might be with or near his family as much as possible; then leaving his home at sunset, he would appear in court the next morning, ready after his all-night drive to prosecute the business of the day.¹¹

¹¹Certificate of admission to the Illinois District Court, Feb. 10, 1842. In an interview with Richard Edwards long afterwards, Fell explained his dislike of law by saying that he wished to be able to use his powers of persuasion where conviction urged, and not for money from clients; and that he disliked to live indoors. "A few years later, having accumulated some property, he voluntarily paid all his indebtedness, although not legally liable." E. M. Prince, "Jesse W. Fell;" Lewis, *Life*, 34.

But the practice of law was as irksome to him as it had been before, and he planned to escape from it as soon as possible. Since real estate offered no means at that time, he resolved to try farming, and for that purpose moved in 1844 to a new home, which was known then and for many years after as Fort Jesse. Some people, appalled at its distance of four miles from the town, called it Fell's Folly. It had been entered for Joseph J. Lewis, and was far from any other habitation, having but one house between it and Bloomington. There was a stream upon the place, which in rainy seasons of the year became too swollen to be forded. Here Fell made a cabin, and broke the virgin prairie in very real pioneer fashion. He rejoiced in the opportunity to plant trees, and put out many of the black locusts which were regarded at that time as particularly well fitted to Illinois conditions, since they grew rapidly and produced a very hard and durable wood. The borer, which makes the black locust an enemy to all other trees and a nuisance in a community, had not then appeared.¹²

The life of the Fells at Fort Jesse was the life of a typical pioneer family. Nightly there burned in their window the candle which pioneer custom prescribed as a guide for travelers; and nightly, there howled around it the prairie wolves. Henry Clay Fell relates an incident which illustrates the conditions under which the prairie farm became a home. Mr. Fell and his wife had gone to Bloomington, and while they were absent a storm had swollen the stream so that it became impassable. Two children, Henry and Eliza, had been left at the farm, and at the coming of the storm they became much frightened. While they crouched in a corner, a big grey wolf thrust in his head at the window, where a pane of glass had been broken out. Henry, altho then but seven years of age, had the courage of pioneer children, and threw a footstool at the wolf's head, which frightened him away. The pet deer, which the children had brought into the cabin, and which attracted the wolves, was later given to a son of General Gridley.¹³

In 1845 Fell bought a farm of one hundred acres near Payson, Adams County, to which he moved from Fort Jesse that autumn. About forty acres of the farm were in timber; and thirty acres of that under cultivation were set out to trees, Fell's intention being to establish a nursery which should cater to the mar-

¹²Jacob Spawr in *Pantagraph*, July 1, 1881. Lewis, *Life*, 35.

¹³Lewis, *Life*, 35. Interview with Henry Fell, May 31, 1913.

ket afforded by the increasing settlements in the neighborhood of Quincy. The nursery business did not meet his expectations, altho he sold enough fruit to make the venture a paying one. The farm, which was about a mile and a quarter northwest of the village, was known as Fruit Hill. As Quincy afforded him his nearest large market, Fell set to work to have a good road made to that town. He succeeded, largely through his own exertions, in securing a straight road of twelve miles which passed through his farm.¹⁴

During this period he found time to take an interest in various public affairs, and particularly in education. He spoke at teachers' institutes,¹⁵ and was much concerned for the welfare of the local Methodist church, of which he became a member. When he moved to Fruit Farm there was only a private school at Payson, but during his residence a "seminary," kept in such a way as more fully to serve the needs of the community, was opened. Farming did not prevent an active interest in state and national affairs, as a letter from Lincoln at this time shows. As an orthodox Whig, he strongly disapproved the management of the Mexican War, and wrote to Lincoln, then serving his state in Washington, to ask him to present a petition for a speedy peace. Lincoln promised to do so at the proper time, but added that there was in Washington a feeling that the war was over and that the treaty sent in would be endorsed.¹⁶

In 1849 a number of the citizens of Quincy, led by John Wood, afterward governor, resolved to go to California, where the gold fields were attracting people from all parts of the world. Fell was asked to join the party, and made preparations to go, altho it was necessary to borrow money for the expedition. He went to Bloomington and bade his friends good-bye, but at the last minute failed to raise the funds necessary for an outfit, and gave up the project.

In 1851 he arranged to return to Bloomington by trading his Payson farm to his brother Robert for a farm of two hundred forty acres near Bloomington. Robert Fell disposed of his nursery stock to F. K. Phoenix, who came to Bloomington from Delavan, Wisconsin, at Jesse Fell's earnest solicitation. Starting with Robert Fell's stock of trees, Phoenix in time developed

¹⁴Lewis, *Life*, 37. Fell to Rachel Brown, Oct. 1, 1848.

¹⁵The report of one such address, given before the Adams County Institute, is in the *Western Whig* of July 20, 1850. Lewis, *Life*, 36.

¹⁶Lincoln to Fell, Mar. 1, 1848.

one of the most famous of the nurseries for which Normal was later notable.

Upon his return to Bloomington Fell first engaged in newspaper work, of which mention is made elsewhere more particularly. He soon gave that up, however, to reënter the field of real estate, which was again becoming a source of profit. Having little money of his own, he made a trip to New York and Boston in the autumn of 1852, for the purpose of interesting eastern capitalists in Illinois land.¹⁷ In this he was very successful, and during the decade following he bought and sold great tracts of land throughout Central Illinois, founded several towns, and enlarged others. Pontiac, Lexington, Towanda, Clinton, LeRoy, El Paso and other towns were among those in which he was largely interested. He made additions to Bloomington and Decatur, and dealt in town lots in Joliet and Dwight. North Bloomington, later Normal, was first planned in 1854.¹⁸

With the founding of these towns came the need of means of communication and transportation. In road-building of the primitive sort which served Illinois for years, Fell did his part. He secured, for instance, the surveying of a wagon-road parallel to the railroad, from Bloomington to Towanda, altho he did not succeed in having it extended to Lexington. He was active in making a similar road from Lincoln to Minonk. Early in his life he had learned surveying, and this stood him in hand later in many ways. His ability to measure land and determine lines saved time and money in numberless instances.¹⁹

¹⁷Fell to his wife, Sept. 26, 1852.

¹⁸*Pantagraph*, Sept. 1, 1899, Nov. 28, 29, and Dec. 1, 1902. *Bloomington Intelligencer*, Aug. 10, 1853. The first plats of North Bloomington (undated, probably 1854) were lithographed by Latimer Brothers and Seymour, 15 Nassau st., corner of Pine, N. Y. Mr. Fell's interests in Pontiac came very near ending disastrously. An addition to the original town was made on land bought from a youth whose father sold it as his guardian. Later, the Supreme Court made a decision in a similar case which would have invalidated the Fell title and all subsequent titles, had not an astute lawyer of Pontiac, R. E. Williams, been able to prove that the young man had accepted his guardian's arrangements and receipted him. The Supreme Court upheld the Fell title.

For an account of an unsuccessful attempt at town-founding, see J. O. Cunningham, *History of Champaign County*, 672 ff. Judge Cunningham quotes Peck's *Gazetteer* (1837), which mentions "Byron, a town-site in Champaign County", on page 168. *Bloomington Observer*, Nov. 17, 1838. *Pantagraph*, Aug. 24, 1901, and Nov. 29, 1902.

¹⁹Interview, Henry Fell, May 31, 1913.

Going farther afield, in 1855 he bought timber lands in Southern Illinois, and built a lumber mill at Ullin, where the Illinois Central railroad crosses the Cache River about twenty miles north of Cairo. Lyman Blakeslee was his partner in this mill, and his brother Kersey in another at Valley Forge, which was operated by Elijah Depew, an old neighbor in Bloomington. E. J. Lewis, who was employed by Fell for about six months at Ullin, records that the winter of 1855-56 was an unusually cold one in Southern Illinois, the thermometer often falling to eighteen degrees below zero. Armed with stout sticks and a compass, Fell and Lewis tramped over the frozen swamps, personally inspecting the low lands. The growth was cypress for the most part, and the strange "knees" (root protuberances) greatly impressed the two Pennsylvanians, to whom growths so fantastic were entirely new. The mill at Ullin was kept busy sawing out logs, for the unusual amount of ice in the rivers did great damage to the steamboats on the Mississippi and the Ohio, breaking wheels and injuring hulls. Putting into Cairo, they secured oak and other lumber for repairs from Ullin by rail.

The brisk business of that winter led Fell to put great faith in the Ullin venture, and in the autumn of 1856 he moved his family to that place. But the normal demand for lumber in Southern Illinois was not sufficient to guarantee a prosperous business, and in the spring the family returned to North Bloomington. The mills not having fulfilled their initial promise, Fell again turned his attention chiefly to real estate, which had not been neglected during his residence at Ullin.²⁰ In 1856 he advertised for sale "about 5000 acres of land" in Livingston, McLean, and Vermillion counties, and about three hundred fifty town lots in various parts of Illinois.²¹ In the autumn of that year he conducted at least one auction sale of lots (at Towanda) and this method of sale was repeated on a considerable scale in the fall of 1857. Late in the decade his holdings became very large, while records in the abstract offices show that he drove a lively business in transferring property.

It was during the summers of 1856 and 1857 that Fell built the house at Fell Park in North Bloomington, which became afterward one of the landmarks of Normal. The house still stands (1916), altho removed from its original site. It was a roomy square wooden structure, with a cupola atop, and verandas built

²⁰Lewis, *Life*, 44.

²¹*Pantagraph*, July 2, 1856. Tax list, May 14, 1859.

around three sides. It stood upon a knoll which Mr. Fell had selected more than twenty years before as a good place for his final residence.²² Here he secured about eighteen acres on the edge of the town, and planted the land to trees and shrubs according to the plans of William Saunders of Philadelphia, a landscape gardener of reputation. A herd of deer was added later, and the park was frequently opened to the public.²³ Men great in the history of Illinois and the nation were entertained there; it became a famous meeting-place of notable people. Lovejoy, Bryant, Lincoln, Davis, Swett, and other leaders were frequent visitors. The Fell children entertained their friends there freely; it was a center of social life. The master of the house, himself usually absorbed in business, liked to have people about him enjoy themselves. In the town's first years, this was the only private house in Normal in which dancing was permitted.

The years at Fell Park were so full and so pleasant that one likes to linger upon the story of its life. There Mr. Fell's children grew to maturity, busy with many tasks and very happy. Here his elder daughters Eliza and Clara were married, the former to W. O. Davis, for many years editor of the *Pantagraph*, and the latter to Lieutenant James R. Fyffe, an officer of the Thirty-third Illinois Volunteer regiment. Here the older children went to school, with their cousins and neighbors, in a small building used temporarily as a carpenter shop during the building of the house. This was a district school, but as it failed to meet all requirements, Mr. Fell employed Miss Mary Daniels, lately graduated from Mt. Holyoke, to teach his own children, their cousins, and the McCambridge children in his own home. This private school was continued until the "model school" at the Normal School opened.²⁴

The master of the house, who never grew away from the simple ways of living in which he had been bred, directed the industries of the home group. He was himself a man busy with his

²²In 1833, when riding over the prairie with a neighbor named Kimler, Mr. Fell remarked that the roll in the prairie would be an ideal place for a home; whereupon Kimler had replied that probably no one would be fool enough to build so far from the timber. Grace Hurwood to Fannie Fell, Mar. 16, 1913. Captain J. H. Burnham, in his "Our Duty to Future Generations," an Arbor Day address delivered at the I. S. N. U. on April 21, 1905, relates the same incident.

²³J. D. Caton to Fell, Aug. 9, 1866.

²⁴William McCambridge, *My Remembrances of Jesse W. Fell*. (MS.)

hands, where other men of his interests would have had manual labor done by others. He pruned his own trees and supervised personally the planting of shrubs or the erection of new buildings. All this workaday enterprise was not conducive to an appearance of immaculate grooming. His wife, and more especially his daughters, tried to look after him to keep him fresh and trig. His friends, driving to Fell Park to consult him on business or politics, found him perspiringly industrious on the warmest summer days. Distinguished company, received in the parlor, waited while Mr. Fell was being hunted through field and orchard. "The girls" waylaid his path with the paraphernalia of refreshment. Somewhere between the back porch and the front parlor, a hasty scrub, a brushing and a clean collar must be administered. He submitted to this loving supervision good-naturedly; he loved to be "fussed over" by his daughters, and he himself was a man of fastidious personal habits. "It's all right, girls, it's all right," he would say. No amount of feminine emphasis, however, could persuade him that one's personal appearance was a matter of great moment; he was interested in bigger things. The happiness of generations to come was the enterprise of men such as he, and in view of that a dusty coat or work-soiled hands could matter little.²⁵

²⁵Mrs. L. B. Merwin (a grand-daughter), interview, Nov. 29, 1912. Dr. Sweney, the family physician, related a story which shows Fell's indefatigable energy. A refractory horse had kicked him until he was a mass of bruises, and the doctor, being called to repair the damage, had swathed him in bandages and soaked him in liniment and left strict orders that he was to be kept quiet. The next day, calling to redress the bruises, the distressed and apologetic family had to "chase after father" down to the edge of the place, about a quarter of a mile, and bring him up for examination and admonition.—John Dodge, "Concerning Jesse W. Fell," in the *Fell Memorial*.

CHAPTER III

THE JOURNALIST, 1836-1858

In the very early days of Bloomington, General Gridley made a yearly trip to the East to buy stock for his general store. In the autumn of 1836, Jesse Fell and James Allin intrusted to him the important commission of purchasing the equipment of a printing establishment, and of finding a man to edit and print a newspaper for McLean County. Gridley induced two men, natives of Philadelphia, to return with him: William Hill and W. B. Brittain. Hill had been employed for some time upon the *St. Louis Democrat*, and was acquainted with Western ways and conditions. Brittain came directly from Philadelphia, having shipped the press and type by way of New Orleans. The two men arrived in October, but Brittain became discouraged and went back to Pennsylvania before the coming of the outfit. Hill stayed, and setting up his press in a room in the court house, brought out on January 14, 1837, the first number of the *Bloomington Observer*. About twenty numbers were printed before the paper suspended publication. It was well edited and well printed, for a frontier paper; but in the little struggling town it found insufficient support, despite its spirited interest in all that concerned the welfare of the place.¹

Fell and Allin were sadly disappointed at the fiasco. Altho his finances were then at a low ebb,—or possibly because of that—Fell bought what he did not already own of the suspended *Observer*, and began to edit it himself in January, 1838. This venture was somewhat more successful than the first one, as the paper continued to appear for over a year, until conditions caused by the hard times forced Fell again to stop its publication. The last number appeared in June, 1839, after which time Bloomington had no paper for several years. Fell sold the printing outfit, which tradition says was moved to Peoria.²

The recovery from the severe depression of 1837 seems to have been especially slow in McLean County, where land specu-

¹*Pantagraph*, Jan. 14, 1857. Interview with Henry Fell, May 31, 1913. Scott, *Newspapers and Periodicals of Illinois*, 27.

²The *Democratic Press* was established there in February, 1840. Scott, *Newspapers and Periodicals of Illinois*, 278.

lation had been very brisk. Not until 1845 was there found a man who had the courage to undertake to publish a newspaper there. In that year R. B. Mitchell started the *McLean County Register*, but shortly gave it up to Charles P. Merriman, who established a weekly, the *Western Whig*. He associated R. H. Johnson with him late in 1849, and early in 1850 Johnson and I. N. Underwood became proprietors and editors. They associated Merriman with them again somewhat later for about six months. This arrangement terminated on November 19, 1851, at the end of the fifth volume of the *Western Whig*, when Mr. Fell and Mr. Merriman undertook the joint management and editorship of the paper. A new outfit of type, brought up the Illinois River and carted over from Pekin, was purchased and the name of the publication changed to the *Bloomington Intelligencer*. This partnership was in turn dissolved on March 17, 1852, when Mr. Fell became sole editor and publisher. He managed the paper until the end of that volume, November 17, 1852, and then retired, being succeeded by Mr. Merriman as sole owner. Mr. Merriman was a classical scholar of some repute, and changed the name again to the *Pantagraph*, a name under which it has become well known and very influential throughout Central Illinois.³

Fell's connection with the *Pantagraph* did not cease with the termination of his official editorship. His name appeared as late as February 9, 1853, as contributing editor of the *Intelligencer*. As a medium for moulding public opinion, he found it a useful ally, and wrote for it often. Its editors and managers found him a constant source of helpful suggestions, and seem to have consulted with him on questions of business policy.

For many years after disposing of his partnership in the *Intelligencer*, his newspaper work was of this occasional and unofficial nature. During the Civil War, his interest in reform centered in the struggle then waging, but after its close he cherished the hope of establishing at Normal some kind of journal which might become the mouthpiece of various reform movements then more or less before the public. Interesting some of his friends, he purchased an outfit for publishing a paper, and was rapidly completing plans for its appearance when he learned

³Lewis, *Life*, 38. The issue of the *Western Whig* for Dec. 11, 1847, is No. 6, Vol. II. It was published at No. 3 Brick Row, Front street. The inventory of the printing outfit of the *Western Whig* (no date, probably Nov., 1851), is among the *Fell MSS.*

that Scibird and Waters, then proprietors of the *Pantagraph*, were seeking a buyer for their paper. He had already carried negotiations for an editor for his proposed paper, through correspondence with Greeley and others, almost to the point of engaging a certain Dr. Weil.⁴ But as the *Pantagraph* had already a wide circulation and a considerable influence, it was far more valuable to a man with a propaganda than any newly established sheet could be, and Mr. Fell, with James P. Taylor and his son-in-law William O. Davis, made haste to secure it. This was in August, 1868.

The *Pantagraph* was a Republican organ of moderate partisanship. Mr. Fell abandoned the idea of making Mr. Weil editor, deciding to fill that post himself. He entered into editorial duties with zest, perhaps remembering his experience with the ultra-ethical *Eclectic Observer*. Mr. Davis became business manager. Fell was, however, a somewhat impractical chief, by far too idealistic for the environment of a newspaper office. Moreover, the confinement of office life was as irksome as ever. After a few months, he gave up the editorial management, which was taken over by his old friend Dr. E. R. Roe, in June of 1869.⁵ Mr. Fell retained his connection with the paper until late October, 1870, when he sold out his entire interest to his son-in-law. Mr. Taylor also disposed of his share to Mr. Davis, leaving the latter entirely responsible. Mr. Fell thereafter confined his newspaper work to occasional editorials and to special articles upon the subjects which engaged his interest.

⁴T. Tilton to Fell, Nov. 24, 1868. In this letter Dr. Weil, "long . . . known to Mr. Bungay and Mr. Greeley," is recommended for the editorship.

⁵Dr. Roe had entered the Federal army as "a bitter Jackson Democrat," but came back "a Black Republican." He was in every way the man to carry on Fell's dream of a popular newspaper advocating reform. He was very popular, having been advanced to a colonelcy in the army from the ranks. Upon his return to civil life he was elected a deputy in the circuit clerk's office to follow Luman Burr. Luman Burr in the *Daily Bulletin*, July 6, 1913. *Bloomington Democrat*, Sept. 30, 1864; *Pantagraph*, Oct. 1, 3, 1864; Aug. 12, 1868; Nov. 1, 1870; Mar. 13, Oct. 23, 1871.

CHAPTER IV

FOUNDING THE NORMAL SCHOOL, 1853-1860

The advocates of free public schools in Illinois secured a law authorizing but not establishing them, as early as 1825. This law was so amended as practically to annul it two years later, which means that Illinois had no public school system until 1855. The desire for an effective public school law took definite form after an impromptu conference at Bloomington of three men who realized the need of the state and were disposed to take measures to relieve it. These men were J. A. Hawley of Dixon, H. H. Lee of Chicago, and Daniel Wilkins of Bloomington. They issued a call to all friends of free schools for a meeting to be held at Bloomington on December 26-28, 1853. The call was signed by the secretary of state, who had charge of all educational affairs in those days, by the presidents and faculties of two of the leading colleges of the state—Shurtleff and Illinois Wesleyan—by the clergymen of Bloomington, and by others who were interested. E. W. Brewster of Elgin was made president of the conference, which was large and enthusiastic. Every man who had a solution to offer for the educational problems of the state was there with his resolutions, his friends, and his arguments.¹

Several of the principles embodied in the resolutions passed at that meeting were afterward incorporated in the state law, and have been largely instrumental in shaping the educational policy of Illinois. They included a plan for a State Teachers' Institute, afterward the State Teachers' Association, which was carried out immediately and has been in operation ever since. Another called for a state superintendent of schools, who should devote all his time to the interests of education. Authorized

¹State Superintendent of Public Instruction, *Reports*, I, 127-138. *Illinois Teacher*, I, 321-328. The convention here mentioned was not the first of an educational nature in the state, but the first that concerned itself especially with the common school system. *Illinois Teacher*, I, 328-336. J. H. Burnham, "Educational Convention of 1853" in *School Record of McLean County* (McLean County Historical Society; *Transactions*, II), 118-127.

by a new state law, Governor Matteson appointed, on February 9, 1854, Ninian W. Edwards as the first superintendent of schools in Illinois. A third resolution was in favor of a journal devoted to education. This periodical, called the *Illinois Teacher*, was started after the Peoria meeting of 1854, with a curious scheme of editorial management by which a different man was made responsible for its contents each month. The result of this division of labor was an uncertain quality of content and financial disaster. After a year's trial of the plan Mr. Charles E. Hovey of Peoria, one of a valiant group of New Englanders who were then the educational leaders of the state, was made editor and manager. He was vigorous and able, and put the publication speedily and effectively upon its feet.²

Then there came up a question which was bound to cause a discussion, for it involved the fundamental differences of men whose training and ideals gave them widely diverging conceptions of the needs and the consequent policies of the state. This was the question of the establishment of some institution for the better training of teachers. All were agreed that such a school was a vital need; scarcely any two were agreed as to just what type of school could, in this new and growing country, accomplish the end sought in the best way. Jonathan B. Turner, from whose fertile brain came the vast and comprehensive scheme resulting finally in the founding of the great state universities of the Middle and Far West,³ was trying to awaken enthusiasm for a combination school to include agricultural, industrial, and normal school departments. The friends of the already established denominational colleges, who feared the results of separating education and religion by the founding of state schools, wished to add normal departments to Shurtleff, McKendrie, Knox, and Wesleyan. A third group, armed with the record of the normal schools of Massachusetts, strongly advocated a separate and "untrammeled" training-school exclusively for teachers.⁴

Jonathan Turner had organized the State Industrial League, a society working for a state industrial college, and numbered Mr. Fell, who was director of the McLean County division,⁵

²State Superintendent of Public Instruction, *Reports*, I, 146. *Illinois Teacher*, I, 8-18.

³E. J. James, *Origin of the Land Grant Act of 1862*, 25-27 (*University of Illinois Studies*, IV, No. 1).

⁴Superintendent of Public Instruction, *Reports*, II, 52.

⁵Organized Feb. 9, 1854.

among his sympathizers and helpers. Fell was eager to see the industrial college founded, but knowing that a normal school was both more popular and more immediately needed, was willing to wait for the realization of the more comprehensive plan. With Turner he bent his energies toward uniting educational forces for the accomplishment of some one definite object.

The various schemes were further discussed and worked over at a meeting held in Peoria in December of 1854. At the third meeting in Springfield it became plain that the advocates of a separate normal school were strongly in the majority, and the next year in Chicago they secured the passage of a resolution to the effect that the Association did not wish "to discuss any university question, but occupy themselves with the interests of common schools and Normal schools." Mr. Turner, whose visions of the future did not blind him to immediate demands and practical methods, yielded his own larger plan with a grace made possible by his great faith in its ultimate realization: and the Association passed a resolution which called for an appropriation for "the immediate establishment of a State Normal School for the education of teachers."⁶

The legislature, which had already (in 1855) established a free school system, passed the desired law, and Governor Bissell signed it on February 18, 1857. The law designated the members of the state board of education, who were in charge of the affairs of the school, but did not state its location, which was to be decided by competitive bids.

It was after the passing of this law that Fell's interest in the normal school became intensified by the hope of securing it for Bloomington. Long before this he had hoped to see an institution of learning, the exact nature of which was not then clear to himself, in the town of North Bloomington. Upon his return from Payson he had become a member of the first incorporated board of trustees of the Wesleyan University, serving until 1857.⁷ Now he saw in the projected normal school an opportunity of realizing quickly his dream of making North Bloomington a school town, and so attracting to it the class of citizens he wanted

⁶Superintendent of Public Instruction, *Reports*, II, 53ff. *Illinois Teacher*, I, 254.

⁷His greatest service to the institution lay in his influence in changing its location from Seminary Avenue near the present Chicago and Alton shops, in the outskirts of Bloomington, to the central site which it occupies. James Shaw in *Fell Memorial*, 4; John F. Eberhart, *ibid.* 19.

it to have. The block for the "Seminary" had long been selected, but he abandoned it in favor of a larger tract farther removed from Bloomington. Other people had other ideas as to what was the best site. Five, besides the one favored, were offered. The other five, however, had less in the way of subscription attached than the one he advocated. This was part of the Parkinson farm of three hundred fifty acres, owned at that time by Dr. Joseph Payne and Meshac Pike, who had recently bought it. David Davis and E. W. Bakewell each added about forty acres, which made the tract about a quarter-section.

Mr. Fell carried on the work of securing subscriptions, aided by others who reported to him regularly. The amount of the subscription was kept out of the newspapers, and very little said of the matter where rival towns might hear of it. Anything that could be used was solicited; and land, cash, notes, even nursery stock and freight donations, were given. Friends of popular education outside the state were appealed to by some, altho few if any responded.⁸ As is often the case, many of the offers were saddled with embarrassing conditions. One set of offers stipulated that the site should be within a mile of Bloomington; another, that it must be within three-fourths of a mile of the railroad crossing at North Bloomington; still another, within three miles of Bloomington. Mr. Fell's site satisfied all these conditions.

Meantime other towns had not been idle. Batavia offered a ready-made plant in the grounds and buildings of the Batavia Institute and fifteen thousand dollars in cash. Washington, in Tazewell County, offered the buildings and grounds of Washington Academy and cash to the amount of twelve hundred dollars. Peoria was known to be piling up a large subscription, but no one in Bloomington could find out just how formidable this rival was.⁹

It was at this point that John F. Eberhart gave substantial help. He was a teacher who had been forced by ill-health to give up regular classroom work, and who spent much time in holding

⁸Among these was Alexander Campbell, the founder of the Church of the Disciples. He seems to have been favorable to the project at first, but later declined to help. Thirty years after, Fell attributed this to Campbell's statement that "Mr. Bakewell and wife had done enough." Bakewell had married Campbell's daughter. Campbell (Bethany, Va.) to Fell, 1857.

⁹Superintendent of Public Instruction, *Reports*, II, 286-291.

institutes throughout the state. This gave him an opportunity to know conditions thoroly, and his knowledge of conditions made him greatly interested in the projected normal school. He met Mr. Fell first when attending an educational meeting in 1855 or 1856, when he was entertained at the Fell home. The two men became fast friends, and when Eberhart found out how keenly Fell wanted the normal school for his own town, he was minded to give all possible aid. This resolution was strengthened by his own dislike for Peoria, which he considered undesirable because it was "a river town and a whiskey town." He entered into the contest for Fell and Bloomington, even as Simeon W. Wright was entering it as a champion of Hovey and Peoria. For about three months he worked with Fell in McLean County, a guest at his home and party to all his plans.¹⁰

About a week before the final decision was to be made, Eberhart made a trip to Peoria to see clearly just what the situation there might be; and chanced, fortunately for his purpose, upon a friend, a teacher, who in his enthusiasm told him the amount of the subscription already secured. Returning at once to Bloomington, he told Fell that it would be necessary to raise the Bloomington subscription. Fell asked him if a ten thousand dollar advance would be sufficient, and Eberhart replied that it would have to be more than that. Fell suggested fifteen thousand, but Eberhart repeated that it must be still more. Fell inquired if twenty thousand would do, and received the same reply. But when he was asked if twenty-five thousand would cap Peoria's bid, Eberhart replied that such a bid would secure the normal school. Fell vowed that Bloomington would raise the money.

But he wanted to see for himself just how things were at Peoria, since Eberhart's sense of honor prevented him from telling details. He knew that a powerful stimulus, combined with knowledge of the real situation, would be necessary if his townsmen were to be persuaded to raise their already generous bid. Eberhart had brought him the news from Peoria on Friday, May 3, 1857. At Fell's request, he set off at once for Chicago, to interview the three members of the board resident there, in the interests of the Bloomington location. If these men were at all unfriendly, they were effectively won over by Eberhart during the week-end he spent in Chicago.

Meantime, having seen Eberhart off, Fell harnessed Tom to the buggy and set off for Peoria, where he knew there was to be

¹⁰John Eberhart, in *Fell Memorial*, 23.

a citizens' mass meeting that night. He covered the forty-five miles in time to attend the meeting, and was observed in the audience by Hovey. No attempt, however, was made to keep secret the amount of the subscription at this meeting. The jubilant committee, sure that in the short time left no competitor could equal their offerings, were not alarmed even at the sight of their rival's appearance—an apparition that would have meant more to them had they know him better.

It was late when the meeting adjourned, but early the next morning Fell was back in Bloomington, briskly presenting to the leading citizens the somewhat appalling dictum that an additional twenty-five thousand dollars must be subscribed. He began by raising his own cash subscription to two thousand dollars, with seventy-five hundred dollars in Jackson County lands, worth about five dollars an acre. Others caught his enthusiasm and added to their subscriptions until the individual pledges, already totalling fifty thousand dollars, amounted to seventy-one thousand. The county commissioners, who had before subscribed for the county a sum equal to the private subscriptions, now added to the swamp lands already promised, enough to bring the whole amount raised to one hundred forty-one thousand dollars.¹¹

The meeting of the board was to be in Peoria on the seventh of May. A tour of inspection to the proposed site at "the Junction," as Normal was commonly called then, preceded the meeting. The weather had been very rainy and the bare prairie about Bloomington was a hopeless swamp, not liable to make a favorable impression upon critical visitors. Mr. Fell went over the ground carefully the night before, found every mud-hole and every dry ridge, and mapped out a course for the carriages intended to minimize the danger of being mired in a bottomless pit of Illinois mud. When the board made its tour of inspection, Fell rode in the first carriage, and personally directed the driver over the uncharted, soggy ground. The drivers of the other carriages had orders to follow the first undeviatingly on pain of losing life and wages, and on no account to allow the horses to become mired. So conducted, the board made a safe trip and

¹¹The three county commissioners who risked their popularity and tenure of office to secure the normal school (for the pledge had to be made without recourse to a vote) were A. J. Merriman, Milton Smith, and Hiram Buck. They were reelected that fall, but were superseded by a board of supervisors which ratified their action in May. Superintendent of Public Instruction, *Reports*, II, Appendix 22, 371ff.

was returned to the station without accident. The young trees planted along the streets of North Bloomington made a good impression upon the members, it is recorded. From the proposed site they went to the station, where they were to board the train for Peoria. Some half a dozen Bloomingtonians and a reporter accompanied them.¹²

At Peoria there was a similar inspection of the site offered, after which the board sat publicly at the court house. The Bloomington bid was accepted, with conditions attached to secure the somewhat precarious county subscription, which had to be guaranteed by citizens.¹³ Over eighty prominent Bloomingtonians signed this guarantee, Abraham Lincoln drew up the bond, and the pledges were all met.¹⁴

Bloomington was exultant when Fell and his friends brought back to them the news that they had won the new school, and plans for the town that would in time grow up around it were rampant. Ground for the building was broken promptly, the cornerstone being laid on the twenty-fifth of September with all due ceremony. Fell's address on that occasion revealed his own conception of the future of the school. He hoped in time it might become what, for reasons of financial expediency, it was then called: a university. Especially, he hoped that an agricultural school with an experiment farm would eventually become part of the school, and that courses in mechanical studies might be added as opportunity offered.¹⁵

The question of the principalship was a lively issue. Fell, who was a warm personal friend of Horace Mann, had long cherished in his heart the hope of securing his services for the needful West. When planning the "seminary" which was to have been located on the east side of the present Broadway in Nor-

¹²This reporter was Edward J. Lewis, later editor of the *Pantagraph*, and Fell's lifelong friend. The account given, with many incidents not here noted, is found in his manuscript *Life of Fell. Weekly Pantagraph*, May 27, 1857. Lincoln Weldon, interview, July 12, 1913.

¹³Superintendent of Public Instruction, *Reports*, II, 359-364.

¹⁴*Ibid.*, II, 373-378.

¹⁵The new school was to be financed from the income of the college and seminary fund, then about ten thousand dollars per year, which was permanently diverted for this purpose. Many, not without good ground, objected to this diversion, and it was to answer their representations that the singularly inappropriate name of the Illinois State Normal "University" was used, a name which has been retained even after the founding of the state university. State Superintendent of Public Instruction, *Reports*, I, 123; II, 276; *Illinois Teacher*, III, 395.

mal, he had corresponded with Mann and others relative to its constitution, scope and curriculum. He now asked the great educator if he would consider the presidency of the proposed normal school. Mr. Mann was favorably disposed, and before the location of the school had been actually secured, a subscription list signed by Bloomington citizens promised material aid in raising the salary of Horace Mann were he to become the head of the new institution.¹⁶

The meeting of the board at which a "principal" was to be elected was held in Bloomington. Shortly before the time of meeting, a prominent friend of the Peoria faction came to John F. Eberhart, who with Fell led the pro-Mann party, and told him that it was a matter of political necessity that an Illinois man be elected to the position. "If you elect Mann we'll kill him," said this advocate of local sovereignty; and he further intimated that nothing but the appointment of a Peorian could satisfy the disappointed politicians of that city. When the situation became known to Horace Mann, he telegraphed to Eberhart that he would not be a candidate for the place if there were to be any fight connected with it. Since Fell was equally opposed to dissensions at this critical time and realized thoroly the need of united support for the principal of the struggling institution, the plan of securing Horace Mann was reluctantly given up by his friends, and the Middle West lost the strength which might have accrued to this school through the leadership of the greatest educator of his day.¹⁷ After Mann, Mr. Charles Hovey was gener-

¹⁶The subscription list, dated May 1, 1857, was signed by Jesse W. Fell, K. H. Fell, W. H. Allin, C. W. Holder, Jos. Payne, John Magoun, F. K. Phoenix, John Dietrich, E. Thomas, McCann Davis, and amounted to \$750. Mr. Mann had agreed to accept the presidency at \$2500. John F. Eberhart, in *Fell Memorial*, 24, and interview, June 20, 1913. Mann to Fell, June 23, 1856. President F. Wayland of Brown University to Fell, Jan. 29, 1853. *Illinois Teacher*, III, 107.

¹⁷It has been said that the liberal religious views of Mann were largely responsible for that disapproval which resulted in the vigorous opposition to his presidency, the powerful Methodist faction in the state considering him a dangerous leader of the young in spite of his ability. Certain it is that his abolitionist leanings aroused antipathy among that large number who sympathized with slavery or feared to have the question agitated. Pro-slavery advocates especially remembered a speech of Mr. Mann in which he had vigorously assailed Daniel Webster and the Compromise of 1850. These considerations, combined with the fact that Hovey was able to command powerful forces in support of his own candidacy, were quite sufficient to defeat the large-visioned plan of Fell.

ally considered the best man for the position, although Eberhart, who declined the nomination, and a Mr. Phelps were also considered. On the final vote, Hovey was elected by a bare majority.

Once elected, Hovey set to work with great energy and ability to make the normal school a success. The task was a hard one. School opened in the historic Major's Hall, perched atop a grocery store on Front street in Bloomington. There were twenty-nine pupils on the opening day, October 5, 1857, and more followed soon, the total enrollment for the year being one hundred twenty-seven. There were two assistants, and a "model school" for observation and practice.

The troubles of the normal school began with the panic of 1857. Many of the men who had led in the subscriptions found themselves unable to pay what they had promised, and the commissioners were unable to sell the swamp lands that had been counted upon so confidently. Even the title to these lands was found to be uncertain, and Fell made a trip to Washington to secure the complete and formal deed, in order that the lands might be available in case buyers appeared.¹⁸ He returned early in November, with word that the official confirmation would be sent to Springfield. New complications arose, however, after he had left Washington, and the patents for the thirty thousand acres were not issued until January, 1858. The last payment on the pledge from the county lands was paid in October, 1864.

The uncertainty of realizing money from the county grant, with the scarcity of money in general and the unwillingness of one or two of the wealthy land-owners to turn over their promised acres at the time when they were most needed, made it impossible to make the first payment to the contractors, and work was suspended in December of 1857. Of all the thousands subscribed, not even six or seven could be collected for immediate use. The ingenious expedients of Charles Hovey during the dark days that ensued included every possible scheme for making something out of nothing. The school was without money, without established credit, and without that public support which comes with the tradition of success. Some of its opponents began to suggest that a failure so apparent be abandoned. A few stanch

¹⁸In August, 1855, being himself unable to go, Fell had sent his son Henry, now grown to manhood, to Washington to look after the school warrants for Illinois, W. F. M. Army being then in the patent office. He (Henry Fell) remained until the last of October, and was moderately successful in his mission.

friends upheld the hands of the determined president at this time, risking their own property by signing the notes it was necessary to make. These men were Charles and Richard Holder, and Jesse and Kersey Fell. Dr. George P. Rex and S. W. Moulton also helped by giving personal notes. The merchants of Bloomington stood loyally by the school, furnishing materials on credit upon the basis of the faith of the friends and guarantors that the next legislature would make appropriations to cover all debts. This was done at the next session, and work upon the building was resumed in the spring of 1859. The school moved into its new quarters in the autumn of 1860, and on October 5 of that year the last brick was laid, with short speeches, cheers, and a free picnic lunch for all.¹⁹

It seemed to Fell and to other friends of the normal school, that a formal dedication of the building would call attention to the institution, and gain it friends and influence. It was a time of great anxiety and uncertainty, and there were some who hesitated to take time and expense for such an occasion during a period of national peril. The dedication, however, which was on January 30, 1861, not only gained the end for which it was planned, but afforded a relief from the tense anxiety of the time, a comforting assurance of at least one great good accomplished, which gave heart and encouragement to all who attended it. Mr. Fell worked indefatigably to make the occasion successful. Invitations were sent to all the prominent men in the state, and great crowds attended from Bloomington and the nearby towns. It was one of the first normal schools built west of the Alleghanies, and the first state-endowed educational institution in Illinois. Governor Yates and Ex-Governor Bebb of Ohio were there, and many lesser stars. The speeches were given in the great hall of the new building, and the feast which crowned the occasion was in Royce's Hall in Bloomington. Mrs. Fell and her cousin, Mrs. Holder, planned and managed the banquet, at which the mayor presided and Mr. Fell was toastmaster.²⁰

Fell's interest in the school continued always, and for many years was actively shown. He attended the public meetings, encouraged the literary societies, and while a member of the board of education superintended the planting of the campus, of which

¹⁹Superintendent of Public Instruction, *Reports*, II, 99-103.

²⁰Newspaper clippings, undated, in the *Scrapbook. Illinois Teacher*, VII, 78.

more in another chapter.²¹ Through the years of its gradual growth and establishment he was regularly the man who secured the necessary appropriations at Springfield.

²¹G. B. Robinson, secretary of the Wrightonian Society, to Fell, April 30, 1861. Mr. Fell became an honorary member of this society.

CHAPTER V

POLITICAL ACTIVITIES, 1840-1860

The strong admiration which Fell had for Henry Clay led him to take a prominent part in local politics during the first three years of his residence in Bloomington. He was never of those who consider politics so inherently and ineradicably evil that honest men can have no part in them. Politics interested him in an absorbing way at times. He used the machinery of government as a means of securing good ends, and also probably with a keen appreciation of the fun of the game. And he was one of the few men who do not ask or receive material compensation for their participation in public affairs.¹

Until 1840, his political activities seem to have been mainly along the line of securing various favors for the districts in which he was interested, and in urging the election of men who favored internal improvements. In that year he was much in demand for stump speeches throughout Central Illinois, where the campaign lacked none of that picturesqueness which characterized it in the country as a whole. On one occasion a monster procession was organized in Bloomington, to go to Peoria, forty miles away. The *chef-d'œuvre* of the expedition was a great cannon—Black Betty—drawn by twelve horses, and with twelve veterans of the War of 1812 upon it. The procession stopped at Mackinaw, Tremont, Washington, and other towns on the way for meetings. At Washington, after Fell and others had spoken, General Gridley was called upon for a speech, and responded acceptably. The possibility of entering political life appealed to General Gridley, and that fall he was nominated and elected to the lower house at Springfield. Fell advised him the next year to study law, and had afterward the pleasure of seeing him very successful in this profession. The friendship between these two men was cemented by mutual service and sacrifice, for part of the debts for which General Gridley filed a petition in bankruptcy in 1842 were contracted as security for Fell and others in enter-

¹James Ewing, *Memorial Address to Bloomington Bar Association*, 1887. Manuscript in *Fell Papers*.

prises in which both were interested.² Fell was able later amply to compensate his friend for his devotion, but he never forgot the service rendered at the time of the great panic.

Besides the stump speaking, Fell reached the people by means of a circular letter, dated January 20, 1840, which set forth the evils of the Jackson regime and the necessity for reform in the person and under the leadership of General Harrison. This document is couched in somewhat pompous phraseology, but direct, pointed, and dignified—the latter a characteristic rare enough to be appreciated in the Western campaign literature of that day.

Fell's position on the question of repudiation is worthy of comment. The financial panic of 1837 was of unequalled severity throughout the Middle West, and its effects lasted well into the next decade. Men who were able to weather the first months of the long depression went under after brave resistance, when the depression had continued until their hoarded resources were exhausted. One after another, they took benefit of the bankruptcy law passed by a special session of Congress called by Harrison. Land depreciated in value until the best tracts were sold for a song, and then were offered vainly to buyers at any price.³ Not only were individuals ruined by the panic and hard times; it was many years before the state of Illinois recovered from the effects of 1837. The State Bank, as has been noted, suspended payment in 1837, and failed in 1842. The state's internal improvement scheme did not collapse until about 1840, when the legislature repealed the law. The construction of the Illinois and Michigan Canal had stopped in 1839, and was not resumed for some years. Interest on the state debt was paid regularly, however, until 1841, when payments were suspended until July, 1846. The state became so seriously involved that many recommended the extreme means of practical repudiation of the state debt. This proposal aroused the more thoughtful of the men of Illinois to a strong protest, and none opposed the suggestion more vigorously than Jesse Fell. He published, in 1845, an open letter to the Senate and House of Illinois, which was widely copied and

²The petition was made under the law of 1841, and bears date of Feb. 10, 1842. The schedule of debts amounts to \$52,999.42. See Fell's sketch of Gridley in Duis, *Good Old Times in McLean County*, 262-276.

³So late as 1848, Robert Fell was offered eighty acres near the farm of his brother close to Bloomington for \$3 per acre. Lewis, *Life*, 27.

probably had a considerable influence upon the public opinion of the day regarding repudiation. He recommended the imposition of a slight tax, which he said the people would gladly pay, and which would recognize the moral obligation of the state. In addition to the primary motive of common honesty, he urged that the passage of such a law would relieve the state of the responsibility for the Illinois and Michigan Canal, which the bondholders would then take off its hands.⁴

During these years Fell remained a loyal Whig, working in the party councils when occasion required, but steadily refusing to accept office. In 1850 the Whigs of the neighborhood of Quincy—it will be remembered that this was while he lived at Payson—urged him to stand for representative. “[Your views] on the really important question of the times—the non-extension of slavery, will not only meet the approval of the entire Whigs

⁴*Copy of a Letter upon State Repudiation, Jesse W. Fell to the Senate and House of Illinois, 1845.* The following quotations will serve to show his position, which was that of the more conservative thinkers in the state generally:

“ . . . We stand as on the verge of a precipice, and one false step may precipitate us to a depth of dishonor and infamy from which we may never recover. . . . In such a contingency [practical repudiation] our credit and reputation as a state will not only be gone but, it is feared, past redemption; practical repudiation will have received your sanction, and, in return, will consign the State to a depth of infamy from which she can never hope to emerge; . . . Where, let me ask, is the distinction, in morals or common honesty, between the man who boldly proclaims he will not pay a debt, which he alleges was illegally contracted, though based on a valuable consideration, and him who acknowledges that he justly owes, has the means of making restitution, but refuses to make the first effort to do so? . . .

“Let us inquire, in the next place, what will be the practical effect,—what the objects to be attained by this tax, light tho’ it be. If no other object was attainable, that of merely paying the amount of what we justly owe would of itself be all-sufficient, and should impel us to a prompt and cheerful performance of the act. But this is not all. By so doing you will practically extinguish,—you will relieve the people of \$6,000,000 of their public indebtedness. Our bond holders stand pledged, in the event of the passage through your bodies of a revenue law, imposing a light tax for the purpose of paying a part of the accruing interest on our debt, to take the Michigan and Illinois Canal, with its attendant burdens, off our hands, and prosecute it to completion within a given period. Thus relieving us of about one half of our immense State debt.”

of the county, but will I believe tend to secure a strong vote from the free-soilers, who probably in this county and certainly in the congressional district, hold the balance of power," wrote a local Whig leader to him at the time.⁵ Fell refused the nomination.

A little later he found in the columns of the *Intelligencer* a means of influencing public opinion which was practicable even when his private affairs kept him busiest.⁶ He was untiring in his efforts for his friends, and seems in all cases to have given advice which subsequent events justified. Again in 1854 there was a demand that he be a candidate for the legislature, and another refusal. He was wont to remark to his friends, indeed, that after 1852 his interest in politics was buried in the grave of Henry Clay. That interest experienced a prompt and complete resuscitation, however, upon the passage of the Kansas-Nebraska Act. In common with most Friends, the Fell family had long been abolitionists, and when it became clear that the new Republican party was to be organized about the central idea of opposition to the extension of slavery, they united with it eagerly.⁷

The party was organized in Illinois on the 29th of May, 1856, in Major's Hall in Bloomington, altho several preliminary meetings had been held and the leaders were already well

⁵N. Bushnell to Fell, Aug. 23, 1850.

⁶For instance, Richard Yates, in a letter dated Nov. 17, 1852, explains his methods of winning the election of 1852, and thanks Fell for his defense of him in the *Intelligencer*, and for his help for several years past. Yates' account of the campaign is very interesting. He wrote letters, of which he had 150 copies made, to send to Whigs of influence, both known and unknown to him. After ten days he went through each county in the district, "had a little night meeting in each (this is what the *Register* called my still hunt) and at the end of that time I commenced speaking at the various county seats *on a run*, and in twenty days the whole Whig columns from center to circumference were moving in solid phalanx and shouting victory all along the line—Calhoun was cowed—his friends alarmed—Judge Douglas and Shields and Gregg and Harris &c were brought to the rescue—lying handbills and malignant falsehoods were brought in requisition, but in vain—I went to bed the night of the election conscious of victory."

⁷Jesse Fell to his son, Jesse W. Fell, June 16, 1832. In this letter Fell's father tells of his mother's activity and interest in meetings held to express sympathy for the colored people. Mrs. Fell the elder was an admirer of Mrs. Mott and coöperated with her in her efforts. E. M. Prince states in the *Fell Memorial* that the senior Fell operated a station of the Underground Railroad.

united.⁸ The convention held at that time was supposed to be composed of one delegate for each six thousand people, which gave three delegates to McLean County; but others besides delegates participated freely in its business, especially as there seems to have been practical unanimity concerning what was to be done. People came in crowds from all parts of the state, and there was great enthusiasm, which reached its highest pitch when Lincoln gave the famous "Lost Speech." Local tradition places Fell among the many speakers whose efforts were entirely lost sight of in the splendor of that matchless oration; but his characteristic activity at such times, it may be remarked in passing, was rather the framing of resolutions and the urging of progressive measures privately among his friends, than the making of speeches.

By 1856, Illinois people had come thoroly to realize that the Whig party had ceased to be; but the character and policy of its successor was not altogether clear. In no state, perhaps, was the Republican party made up of elements more diverse than composed it in Illinois. The third congressional district, for instance, comprised in 1856 thirteen counties.⁹ The southern counties, still largely influenced by their southern antecedents, abominated abolitionists. The northern counties had been settled mainly by New England and Ohio people, who brought with them very decided anti-slavery views. Fifty-five delegates, representing the thirteen counties, met in convention July 2, 1856, and nominated Owen Lovejoy, altho McLean and all the southern counties had been instructed for Leonard Swett. Lovejoy was known to be an abolitionist, an ex-member of the Liberty party. Moreover, the southern counties had long yielded the nomination to those of the north, and thought that a sense of fairness should have granted them the nomination when they urged so able a candidate as Leonard Swett. Because of these things, the disgruntled counties held another convention on the sixteenth of

⁸Major's Hall was the third story, now demolished, of a building still (1916) standing on Front street in Bloomington. *Pantagraph*, June 4, 1856. Joseph Medill, "Lincoln's Lost Speech," in *McClure's Magazine*, Sept., 1896. For an account of attempts at Republican organization before 1856, see J. H. Burnham, *History of Bloomington and Normal*, 109-114.

⁹Kendall, Will, Grundy, La Salle, Bureau, Putnam, Kankakee, Iroquois, McLean, DeWitt, Champaign, and Vermillion, of which the present Ford County then formed a part.

July at Bloomington, and nominated Judge T. L. Dickey of Ottawa.¹⁰

Fell had been in the East during the first convention, at Ottawa, but he was known to be strongly in favor of Swett. He had gone on private business, but hoping to attend the latter part of the Republican convention at Philadelphia, a hope which was frustrated by delay in his business affairs. He returned, however, in time to attend the great ratification meeting in the square in Bloomington, on the evening of the convention day. After the "bolters" had spoken, some one called on Lovejoy, who had appeared upon the scene. He came to the front and delivered a speech so powerful that he won the unfriendly crowd completely. It was a wonderful victory for the abolitionist, and for the principles of freedom and equality which he advocated.¹¹

On the second evening after, another mass meeting was held on the square, at which Fell offered resolutions in favor of Lovejoy. The crowd was again carried away with enthusiasm, and readily adopted them. Lovejoy sentiment grew from day to day. Judge Dickey later withdrew from the contest, and Lovejoy was elected by a large majority. It was during this campaign that there sprang up the warm friendship between Fell and Lovejoy, which was to last until the death of the latter in 1864.

During the campaign that followed Mr. Fell made many speeches. The Republican organization in Illinois was rapidly completed, and the party pushed its campaign so energetically that it won the governorship, altho the Democrats were successful in the general elections. During the summer the Bloomington Democratic and Republican clubs exchanged speakers, Mr. Fell being invited to represent his party before the Democratic Club.¹² He was active in the county nominating convention in September. Throughout the summer, however, he seems studiously to have confined himself to local activities.

Among the forces that were powerful in shaping public opinion in Illinois after 1853, were the Kansas Aid Committee

¹⁰*Pantagraph*, June 11, July 2, 9, 23, 1856; April 11, 1868.

¹¹Brush, *The Political Career of Owen Lovejoy* (manuscript thesis, University of Illinois), 12. Prince says (*Historical Encyclopedia of Illinois and History of McLean County*, 1029) that this appearance of Lovejoy had been planned by Mr. Fell, who thought it the best way of reconciling discordant elements in the party. Burnham, *History of Bloomington and Normal*, 114.

¹²Adlai Stevenson in *Fell Memorial*, 49ff.

and its allies. General W. F. M. Army, a West Virginian who lived in North Bloomington, was a leader in the work of helping Northern men in Kansas.¹³ The big barn at his home was a depot of supplies for Kansas families sent in by sympathizers from far and near. The town was a recruiting station for immigrants bound for Kansas. The Fells, being anti-slavery people, helped in the work. In 1856, at the national convention of the society held in Buffalo, Abraham Lincoln was appointed on the National Kansas Aid Committee. He declined to serve, however, alleging other pressing duties, and recommended Fell as a substitute. General Army wrote at once to Fell offering him membership, as representative for Illinois, and asking him to attend the meeting in Chicago on July 30. Fell in turn declined, recommending Army himself for the post, to which in due time he was appointed, and served with marked ability.¹⁴

After 1856 Fell's interest in politics did not flag. His map of Illinois, with the senatorial districts carefully inked in, and the party vote for each district for 1858 written in the margin, shows how closely he kept track of conditions and tendencies. He was close to the people, and knew their ideas and their heroes. He was close to the leaders, knowing their ambitions and their motives. He was interested in all public affairs, concerned with the growth of the country, solicitous for the right solution to national problems.¹⁵ In 1857 he was commissioned by the state central committee as corresponding secretary to visit different parts of Illinois for conferences with leaders. He knew the pulse of the state as no one else could.

As has been noted, Fell met Lincoln in 1834-5, when Lincoln and Stuart were serving in the state legislature. At circuit court sessions they were more or less closely associated while Fell continued to ride the circuit, and after he had given up law for real estate their friendship continued. In the campaigns of 1840 and 1844 they were active and friendly Whig partisans. They called each other by their Christian names, and it was noted with

¹³Wm. M. McCambridge, "My Remembrances of Jesse W. Fell," manuscript. *Pantagraph*, June 25, July 2 and 23, 1856.

¹⁴Army to Fell, July 22, 1856. *Chicago Tribune*, same date. The *Pantagraph* of July 23, 1856, says that "A. Lincoln is a member of the national committee." The facts were related by Fell himself in a letter to a newspaper, Oct. 3, 1881: *Scrapbook*.

¹⁵Dept. of Interior to Owen Lovejoy, May 25, 1858. Lovejoy to Fell, undated.

amusement by their common acquaintances that Fell never called Lincoln "Abe" after the easy fashion of most Illinoisans. It was one of the Quaker characteristics which gave him a gentle dignity which all men respected, that he did not use nicknames. Lincoln was often at the Fell home in Bloomington, and the two men seem to have carried on a friendly correspondence whenever there was public business upon which they might coöperate.

John F. Eberhart says that Jesse W. Fell and his brother Kersey were the first men to suggest Mr. Lincoln as presidential timber.¹⁶ Be this as it may, there is no question that the idea of joint debates between Lincoln and Douglas originated with Jesse Fell and was repeatedly suggested until the debates became a reality. They were first proposed by Mr. Fell in September of 1854 on the occasion of a speech by Senator Douglas in Bloomington. Mr. Fell's request was then based on a general desire of people to hear the two together. Douglas declined to debate, and Lincoln goodnaturedly agreed to postpone his own talk until "candlelight".¹⁷

There was no doubt among the Republicans of Illinois as to their choice for senator in 1858. They wished to make the nomination at the state convention, a proceeding until then unheard-of. In the McLean County convention, held June 5, Fell offered resolutions "that Lincoln is our first, last and only choice for the vacancy soon to occur in the United States Senate; and that despite all influences at home or abroad, domestic or foreign, the Republicans of Illinois, as with the voice of one man, are unalterably so resolved; to the end that we may have a *big man*, with a *big mind*, and a *big heart*, to represent our *big state*."¹⁸ The resolutions were read amid shouts of approval, and were adopted with rounds of applause. Throughout the state the feeling was the same. At the state convention, held in Springfield on the 16th, practically the same resolutions were adopted.¹⁹ It was at

¹⁶*Fell Memorial*, 26. J. R. Rowell in *ibid*.

¹⁷Stevenson, *Something of Men I Have Known*, 8. Lawrence Weldon, "New Lincoln Stories" in *Chicago Tribune*, Feb. 9 and *Pantagraph*, Feb. 10, 1902. Fell's own account is in Oldroyd, *Lincoln Memorial Album*, 468-472. James T. Ewing tells it in his contribution to the *Fell Memorial*.

¹⁸*Pantagraph*, June 1 and 7, 1858.

¹⁹The comment in the Democratic organ, the *Illinois Statesman*, of June 3, 1858, besides furnishing a typical example of the attitude of non-Republicans toward Lincoln, refers to a "secret caucus" of the night before. Probably the presentation of the resolutions was carefully planned by the leaders at this meeting.

the evening session of this convention that Lincoln delivered his "House Divided" speech. To trace the courses of speeches and replies that followed, as Lincoln and Douglas pushed their rivalry, would be to repeat a story that has already been well and fully told. Of especial interest here is the journey of Fell through the states north and east of Illinois, during the time when the debates were taking place in Illinois, and later. He visited all the New England states but Maine, and New York, New Jersey, Pennsylvania, Ohio, Michigan, and Indiana. Everywhere he found Republicans who were interested in the debates, and who were eager to hear about the man who was successfully defying and answering Stephen A. Douglas. As he sounded the praises of his friend, the conviction grew in him that in a still larger field Lincoln might become the successful rival of the great Douglas.²⁰

When he returned to Bloomington, Fell proposed to Lincoln that he should be the next Republican candidate for president. This was in his brother Kersey's law office. The story of that conversation, which Mr. Fell afterward substantially reproduced, is well known. Lincoln professed to think it a very foolish idea, and declined to write the autobiography for which his friend asked, that he might acquaint people in the East with Lincoln's personal history.²¹ Nevertheless Fell quietly pursued the realization of his "big idea," which other foresighted Republicans shared with him, through 1859. He was secretary of the state central committee for his party, and in that capacity he kept a sensitive finger on the pulse of the state. He found occasion, moreover, in perfecting the state organization, to visit most of the counties, where the people as a rule were eager to see "Abe" Lincoln a presidential candidate. There was no need, apparently, to urge Lincoln's name to Illinoisans. It was in other states that the Lincoln propaganda must be pushed.

Lincoln himself began to think seriously of running for president during the summer, and especially after visiting Kansas and Ohio in the fall. On December 20, when Fell repeated his request, Lincoln gave him the famous autobiography. Without waiting to copy the paper, Fell sent it at once to his friend, Joseph J. Lewis, in Westchester, Pennsylvania. Mr. Lewis' use

²⁰Lewis, *Life*, 64; Oldroyd, *Lincoln Memorial Album*, 472-478.

²¹Oldroyd, *Lincoln Memorial Album*, 477 (Fell's own account). Arnold, *Life of Lincoln*, 155. Tarbell, *Life of Lincoln*, II, 128-130. *Bloomington Eye*, March 6, 1887.

of it forms one of the most interesting chapters in the story of Lincoln's rise to the presidency.²²

During all the years since leaving Pennsylvania, Fell had never suffered himself to lose touch with public affairs in his native state. Through correspondence and through many return visits, even after all his family had removed to Illinois, he kept himself well informed of tendencies and opinions in Pennsylvania.²³ He knew that that state had already, in 1859, become a stronghold of the new party, with opposition to slavery extension and high tariff for the backbone of its platform. He knew that Seward, who held the unswerving allegiance of New York, was not popular in Pennsylvania. He knew that Lincoln, popular in the West, needed the support of the East also, if he were to win from Seward the Republican nomination in 1860; and that the influence of Pennsylvania, direct and indirect, would be an important factor in the coming national convention. Pennsylvania, if won for Lincoln, must know about him.

²²Arnold, *Life of Lincoln*, 14. Joseph J. Lewis to Fell, Mar. 28, 1872. Lewis to J. R. Osgood, same date. This autobiography, with the letter from Lincoln which accompanied it (dated Dec. 20, 1859, and now in the Oldroyd collection), was later the subject of a prolonged controversy between Mr. Fell and his family and Mr. Oldroyd, who made a notable collection of Lincolniana. The manuscript was returned by Lewis to Fell, and was later loaned, with the letter, to Mr. Oldroyd. Mr. Oldroyd returned the autobiography, but has never returned the letter. Memoranda among the Fell Papers, and letters; from O. H. Oldroyd to Fell, April 3, 1882; Shelby M. Cullom to Lawrence Weldon, Aug. 30, 1887. A facsimile of the autobiography was published in 1872 with an introduction by Mr. Fell.

²³Issachar Price to Fell, Downingtown, Pa., Sept. 24, 1838. In this letter, one of the most interesting in the Fell collection, Mr. Price gives a rather pessimistic view of political conditions in Van Buren's administration. "Ritner cannot be elected; he is the most prevaricating shuffling tool that ever *set on a throne*," he says; "promise one thing today and go right to the contrary tomorrow; this he has done in 20 instances to my own knowledge & his great drill Sargeant Thad Stevens is the most barefaced impudent scoundrel now unchained and running at large in the state." This estimate, from which doubtless Fell deduced his own more charitable conclusions, is followed by a prophecy of the vote in the coming election. Speaking of national politics, this Pennsylvania village postmaster predicts: "Abolition will entirely swallow up antiism in fact anti-masonry is defunct—abolitionism takes its place & the party that adopts it as a *test* is destined to *growl* in a *glorious minority* for many a year to come & this will be the end of the great and talented Whig party in the U States."

Joseph J. Lewis was a prominent Republican who wrote persuasively, and who was personally influential in Eastern Pennsylvania. He took care to inform himself rather minutely concerning the Westerner before he prepared, from the autobiography and from other material which Fell furnished, an article which introduced Lincoln to the people of his part of the state. This article appeared first in the *Chester County Times* of February 11, 1860. It was widely copied throughout the state and beyond it, and together with the personal work and speeches of Lewis and others whom he interested, served to acquaint the Pennsylvanians with the career and character of Abraham Lincoln.²⁴

It is interesting to note how the two men who planned Lincoln's introduction to Pennsylvania selected from the material at hand those elements which they knew would count for most with the people with whom they dealt. He was "certainly not of the first families," said Mr. Lewis. His ancestors were Friends—a circumstance with which, it is safe to say, very few Illinoisans were acquainted. They had gone from Berks County, Pennsylvania; but in Illinois no one traced the Lincoln family back of its Virginia antecedents. Descendants of the same stock, Mr. Lewis continued, still lived in Eastern Pennsylvania. He had been a strong Whig leader, a friend of Henry Clay, a great worker in the campaign of 1844, and was master of "the principles of political economy that underlie the tariff" question. Pennsylvania was especially assured that: "Mr. Lincoln has been a consistent and earnest tariff man from the first hour of his entering public life. He is such from principle, and from a deeply rooted conviction of the wisdom of the protective policy; and what ever influence he may hereafter exert upon the government will be in favor of that policy."²⁵ Lewis' account of Lincoln's sacrifice of his own chances of election to the Senate in 1854, when he asked his friends to vote for Trumbull rather than risk the election of Governor Matteson, a Nebraska Democrat, must have had its intended effect with the anti-slavery Republicans of Pennsylvania. He attributed Douglas' success after the debates of 1858 to an "old and grossly unequal apportionment of the districts."

As the time for the national Republican convention drew

²⁴J. J. Lewis to Fell, Jan. 30, 1860. Vickers Fell to E. J. Lewis, June 3, 1896. *Daily Local News* (Westchester, Pa.), Apr. 9, 1883.

²⁵Blaine, *Twenty Years in Congress*, I, 196-207.

near Lincoln's friends realized that, barring the chance of one of those tricks of fate which sometimes change the course of events at political meetings, his only serious rival was Seward. Cameron and Bates had only local support, and were not greatly feared. Leonard Swett, David Davis, and Jesse Fell were the three Illinoisans most active in their efforts for Lincoln. Fell had declined to be secretary of the Republican state committee again, that he might have more time for field work. In the spring of 1860 he had endeavored to secure full lists of names from the entire state for the documents sent out by the Republican national committee. Nothing that could aid in preparing Illinois to play her part in the coming drama was omitted.²⁶ Financial support was assured through a well-organized system of county assessments, collected in 1859 to be ready for campaign purposes. It was planned that a great delegation should go from Central Illinois to Chicago to support Lincoln.²⁷

²⁶Fell, in Duis, *Good Old Times in McLean County*, 280. Circular letter of the Republican State Central Committee, June 23, 1860. This letter was issued by the secretary, Horace White, who succeeded Fell. Circular letter from Fell to chairmen of county central committees, May 8, 1860. Both of these latter circulars show the methodical business administration by which Fell secured an unusual degree of unity and assured resources for the great campaign.

²⁷The account of the convention has been told many times. There is a story of the events of the meeting which because of its connection with Mr. Fell may be repeated here. It is unsupported by any sort of documentary evidence but persists among the older citizens of Bloomington to an extent which at least warrants its repetition. It is to the effect that the Illinois leaders discovered that the tickets of admission issued to delegates and visitors to the convention were almost monopolized by the large delegations from the East which supported Seward. The Lincoln contingent, having gathered with great enthusiasm, was suddenly reduced to the depths of despair by the announcement, on the morning of May 18, that all the tickets had been given out, and that they would therefore have to content themselves with standing outside the Wigwam. The Western leaders gathered quickly for a conference, because the popular enthusiasm for Lincoln of the delegations from Indiana and Illinois was an asset upon which they definitely counted in the session to come. Fell promised a solution, and made good his promise by securing another set of tickets, similar to the first, which he had hastily printed. These were fairly distributed to the leaders of the various delegations, including the Seward men, who distributed them to their adherents. During the morning the Seward men, feeling secure of their seats in the Wigwam because of the tickets they held, organized a monster parade for Seward, led by

Joseph Lewis, with other delegates from Pennsylvania, did valiant work for Lincoln, and nominated Lewis' old friend, John Hickman, for the vice-presidency. General Stokeley was a delegate from Ohio who gave substantial aid.²⁸ The Pennsylvania contingent, returning full of enthusiasm to its own state, pushed the campaign vigorously, Lewis keeping in close touch with Lincoln through his correspondence with Fell. In order to bring to Pennsylvania some of the enthusiasm of the Western men, Lewis tried to secure Davis and Swett as campaign speakers for his state, but failed to convince the central committee of the advisability of this plan. Davis and Swett, of course, were well occupied in Illinois. Owen Lovejoy, candidate for the House, conducted a lively campaign, guided in his methods by the advice of Fell, who had become his close friend and hearty supporter. Fell's own campaign notebook, filled with newspaper clippings and notes for comment and reply, has been preserved, and shows a collection of indictments of slavery, Southern commendations of Buchanan (with caustic comment very belligerent for a Quaker) and clippings about "Bully" Brooks. The summer and autumn were for him, as for many Illinoisans, one long effort to make Lincoln the head of the nation.²⁹

the band which had come with them from New York. Returning to the hall, they found the Western men already admitted in large numbers, and ready to shout for Lincoln, while other crowds filled the streets for blocks in every direction.—Henry Fell in the *Fell Memorial*, 12. Horace White considers the story improbable. Horace White to the writer, April 30, 1914. A good account of the convention from the standpoint of an Illinoisan is found in a letter by Leonard Swett to the Hon. Josiah H. Drummond of Portland, Maine, and dated May 27, 1860. Published in the *Moline (Ill.) Mail*, and later in the *Pantagraph* of Jan. 8, 1909.

²⁸J. J. Lewis to Fell, May 28, 1860. Gen. Stokeley to Fell, Dec. 21, 1860.

²⁹Concerning the campaign in Pennsylvania: Lewis to Fell, May 28, June 17, July 9, Sept. 1, Sept. 25, Oct. 1, Oct. 21, 1860; John G. Nicolay to Fell, July 19, 1860; Lincoln to Fell, Oct. 5, 1860. Concerning Owen Lovejoy: Lovejoy to Fell, May 28, June 27, July 21, Sept. 11, 1860.

CHAPTER VI

THE YEARS OF THE CIVIL WAR

Following his election Lincoln stood the fire of a brisk siege of office-seekers. Joseph J. Lewis was actively corresponding with him and Fell during this time, not only because he hoped to receive some sort of reward for his services in Pennsylvania, but also because a man whom he had cordially disliked, and of whose loyalty to Lincoln during the campaign he had the strongest doubts, seemed destined to receive a cabinet appointment. This man was Simon Cameron. Stimulated by Lewis' representations concerning the character and ability of Cameron, Fell visited the president-elect and told him what Lewis had written him.¹ Lyman Trumbull and others also told Lincoln of Camer-

¹Lewis to Fell, Dec. 17, 1860; Jan. 15, 1861. In view of Cameron's subsequent record as secretary of war it is interesting to note Lewis' unqualified condemnation. "At Harrisburg I found but one sentiment prevalent, and that was, of extreme satisfaction that the incarnation of the idea of public corruption was not to enter the cabinet. Men spoke out who had before been restrained by fear, and the feeling was one of great relief. When we were informed that the place of secretary of the treasury was offered to Cameron, and accepted by him, the information produced grief, and mortification. I felt mortified and humbled. I happened to enter a few nights after a room where a number of leading Republicans were assembled discussing the subject. 'Is this the man,' said one of them to me, 'that you promised us, had such an instinctive horror of corruption that it could not be suffered to come near him? What will you say when you find all the banality of Albany and Harrisburg combined transferred to Washington and pervading all the highest places in the government?' I was urged to undertake in company of Henry C. Casey a mission to Springfield to disabuse the mind of the president-elect, and relieve it from its delusion. I had but to answer that Mr. Lincoln had but to know that he had been imposed upon & he would certainly retrace his steps—that it was hard for a man in his position to resist the pressure upon him from unexpected quarters and from men who possessed his confidence and that it was our duty to make the truth perfectly clear and apparent to his mind so that he might discover it even through the mist which the hopes of personal favor or the fears of personal resentment had raised to obscure it. When the news came that Mr. Lincoln had become informed and had acted on that information the joy

on's reputation and record. The president-elect seems to have given up the idea of appointing him to the portfolio of war by early January, but afterward again altered his plans; and Cameron's name appeared with the other appointments in March.

In the case of Norman B. Judd, who made the nomination of Lincoln for the Illinoisans, Lincoln was more effectively counseled. No paper left by Mr. Fell illustrates better his sound political judgment than the letter of January 2, 1861, in which he discusses with Lincoln the possibility of a cabinet appointment for Judd or Davis. After speaking of his own high regard for Judd, he said that in the state there was much bitterness toward him, particularly in the Whig element of the party. The causes of this included his opposition to Lincoln in his first contest for the senatorship, which was still remembered in a way to make his appointment "a bitter pill to many of your old and tried friends." The Republicans of Whig antecedents wanted to see David Davis in the cabinet; and of his loyalty and devotion there could be no question. But Fell thought it unwise, since Illinois had the presidency, to make any first-class appointments there. He begged Lincoln not to increase the feud between the two elements of the party (just then at its height because of the imminence of the slavery conflict) by appointing the leader of either. Indiana and Pennsylvania should be given cabinet appointments, but by avoiding the gift of any in Illinois friction could be allayed. Davis had agreed with these sentiments in October; nor did Fell add, what was probably patent to him, that Davis might have changed his mind since then. He expressed a strong hope that his friend might be given a "first-rate second class appointment."

Joseph Lewis would gladly have accepted a foreign post. But this was not forthcoming, nor was any other federal appointment until March, 1863, when he was appointed commissioner of internal revenue, a position for which Lincoln had been considering him for about a year.² Fell's friends confidently expected to see him appointed to some place of importance, but such an appointment was as distasteful to him then as at any other time in his life. The circumstances of Lincoln's elevation did not alter his own fixed plans, principles, and preferences,

was great. Many felt that a step had been taken which would save the nation from disgrace and the Republican party in Penna from shame and confusion . . ." See White, *Life of Lyman Trumbull*, 142-152.

²Lewis to Fell, Mar. 1 and 27, 1862; Mar. 13, 1863.

which seem to have been to bring about what he considered desirable events and results, through personal influence rather than by personal administration. At the outbreak of the war he was offered a place as assistant quartermaster, with rank of captain. This, with probably other similar offers, he declined, and continued for a time to carry on his regular business as usual.³

When the certainty of war was clear to everyone, at the fall of Sumter, men who felt the responsibility of leading public opinion bent their energies toward uniting the country in support of the government. The friends of Lincoln in Central Illinois wished especially to hold up the hands of the president by assuring him of popular support. On the day after the fall of Fort Sumter, Mr. Fell hurriedly gathered together a group of the leading men of Bloomington, both Republicans and Democrats, in an upper room on Washington street. He had resolutions ready as usual, which were voted for by everyone except Mr. Snow, who sympathized with secession and had the courage to say so in an overwhelmingly loyal community. Being united among themselves these local leaders next turned their attention to building up popular union sentiment. They had handbills printed and distributed announcing a mass-meeting to be held in Phoenix Hall that night; and before separating, agreed upon a long program of speakers upon whose sentiments they could rely, that there might be no time for possible dissenting volunteers from the audience.⁴ Mr. Spencer presided that evening, and one prominent man after another addressed the people. A great flag draped across the platform gave the keynote of loyalty. The people cheered it enthusiastically, and sang patriotic songs. The resolutions were presented by Rev. C. G. Ames, who called upon those "who in their hearts swore to the sentiments therein expressed" to hold up their right hands in voting. "A response like thunder came up from the densely packed audience,

³Fell to Richard Yates, Aug. 21, 1861. This letter has been lost, but is on record.

⁴Among those who attended were C. P. Merriman and Dr. David Brier, Republicans; Hamilton Spencer, T. P. Rogers, Allen Withers, Dr. E. R. Roe, and H. P. Merriman, Democrats—the last two of the Democratic *Statesman*; and D. J. Snow of the *Times*. The speakers of the evening meeting included James S. Ewing, Col. W. P. Boyd, Dr. T. P. Rogers, Dr. E. R. Roe, Rev. C. G. Ames, Harvey Hogg, and E. M. Prince. The resolutions are given in the *Lewis Life*, 68, and in the *Pantagraph*, Apr. 17, 1861. Dr. Roe's account of the meeting is in the *Pantagraph* for July 29, 1871.

and a thousand hands flashed in the light above the sea of heads, like the drawing of myriad swords." This meeting, the first of its kind in Illinois, was followed by many in other towns all over the region, and is a type of the means by which the people were stirred to loyal support of the administration.

As the friend of Lincoln, Mr. Fell found himself more in demand as a political power than he had ever been. His old friends found him responsive as formerly; new friends, called to his attention by the circumstances of the times, found him ready and anxious to help where help was needed. Owen Lovejoy called upon him freely for aid and advice; Governor Yates and Lyman Trumbull asked and received suggestions from him. He united with Lovejoy to urge Davis' appointment to the supreme bench.⁵ Yates, who met determined and influential opposition, largely upon personal grounds, especially appreciated his loyal support. Opposition to the governor, at a time when every element in Illinois should have been united in support of the administration, seemed very foolish and wrong to Jesse Fell, and he used his pen and his personal influence to gain better co-operation for the governor.⁶

Fell's relations to Owen Lovejoy, whom he greatly admired,

⁵Owen Lovejoy to Fell, Apr. 1, 1861; Fell to Yates, Apr. 8, June 12, 1861; Lyman Trumbull to Fell, Feb. 1, June 7, 1861; Yates to Fell, Aug. 13, 1864.

Among the letters of this period is one from Fell to Governor Yates, dated Aug. 18, 1864. It called Yates' attention to the fact that there was no practical farmer among those appointed to suggest an application of the funds accruing to Illinois under the Morrill Act, and suggested George W. Minier of Tazewell County, a successful farmer and a forcible writer, as a member of this committee. Letters concerning the appointment of Davis are not now available, but Fell's article in the *Pantagraph* of Apr. 11, 1868, contains a statement of his agency.

An undated petition to Lincoln in behalf of Jesse Bishop of Marion, Ill., who had suffered at the hands of secession sympathizers, belongs to this period. It is signed by Thomas I. Turner, Jesse W. Fell, Richard Yates, W. Bushnell, Richard Oglesby, S. M. Cullom, and others. Kersey Fell seems especially to have interested himself in helping those upon whom the burdens of the war were heavy. A set of letters from him to Governor Yates, dated from Sept. 21, 1861, to Dec. 27, 1864, are filled with requests for passes, money, or permits to all sorts of folk who needed help. (*Yates MSS.*)

⁶Richard Yates to Fell, June 7, 1862.

were especially close during the war.⁷ Lovejoy at Washington and Fell in Illinois and other states of the Middle West found many ways of helping each other; and they liked to compare notes and opinions. Writing to his friend early in October, 1862, Fell said: "Can it be possible that the Almighty, (who will pardon my presumption) is so poor a general as to suffer this war to come to a close without sweeping, as with the besom of destruction, that damning sin that has thus culminated in civil war. We will trust not—and will pray not; at least till the 'old cuss' shall be 'placed'—as Honest Old Abe expressed it—in process of final' and may we justly add 'speedy extinction.' " Lovejoy replied, "My trust is in God for the nation."⁸

Among the friends of Mr. Fell who by no means shared his own Quaker aversion to war, was the "Fighting Schoolmaster," Charles E. Hovey, the normal school president who led the Thirty-third Illinois out of the schoolroom into the field. Without having had technical training in tactics he proved an able commander. But he was never able to qualify his outspoken New England anti-slavery sentiments, nor did he find any common ground with the West Point officers with whom he was associated, and who were able to understand the point of view of Southern men. He asked and received Mr. Fell's aid in enterprises for which he needed an agent in civil life, while Fell appreciated the opportunity of keeping in close touch with field operations through a man whom he knew to be trustworthy.

His own participation in the war, until now delayed by the pressure of private business and a distaste for military life, began in 1862. He had gone with Hovey to Washington in late June, 1861, to see Lincoln about the organization of the normal school regiment, and to observe the situation there for himself. With Hovey he went out with the crowds which followed the army to the disastrous battle of Bull Run. After the battle,

⁷Lovejoy to Fell, Dec. 7, 1862; Fell to his brother Vickers Fell, Oct. 7, 1862.

⁸Lovejoy selected Fell to prepare, after his death, such a memoir as might seem suitable. In April, 1864, therefore, his daughter wrote to Fell asking him to do this last service for his friend. Fell was also among those who raised money for the erection of a monument, and he seems to have secured payment to Lovejoy's heirs of money owed him. Lucy I. Lovejoy to Fell, Apr. 6, 1864. Circular letter from Princeton, signed by John H. Bryant, C. C. Mason, and F. Bascom, May 10, 1864; Bryant to Fell, Nov. 18, 1865.

while Hovey surveyed the field and interviewed spectators, Fell found congenial employment in helping about the hospitals which had been hastily improvised. He found there a certain Captain McCook lying mortally wounded. He was able to help many, and remained with Captain McCook and his father until the death of the former. Returning from Washington impressed with the magnitude of the coming struggle, the sense of his own obligation to bear a part in it grew as time passed. In the second year of the war he arranged his nursery and real estate businesses for a long absence, and offered his services to the president. Knowing that his talents were not military, and that he had passed the age when he might have been trained into a fighting man, he accepted gladly the position of paymaster, to which the rank of major was attached. The appointment seems to have been a pet project of Lincoln, as his letters on the subject attest.⁹

He accepted the appointment on the 19th of July, 1862, and began his duties soon afterward at Louisville, Kentucky. He took with him as a clerk William O. Davis, who was betrothed to his daughter Eliza.¹⁰ As a friend of the president, he was received among his colleagues with unusual interest, which gave place soon, as Rodney Smith bears witness, to deep respect and admiration. His habit of going about unarmed—the expression of a fixed principle of trusting men—was regarded as a foolhardy concession to these ideals by his colleagues; but there is no record of any attack upon him during the entire time of his service. He employed himself first in mastering the intricate red-tape of the service, after which in August he was sent to Indianapolis to pay the Sixty-ninth Indiana Infantry. From there he went to Springfield, Illinois, which was his headquarters while he paid the Illinois troops then being hurried to the front. Major William Smith, a more experienced paymaster, took Mr. Da-

⁹Lincoln to the secretary of war, Dec. 23, 1861, Mar. 29, 1862. "I really wish Jesse W. Fell, of Illinois, to be appointed a Paymaster in the Regular Army, at farthest, as early as the 1st of July, 1862. I wish nothing to interfere with this; and I have so written as much as two months ago, I think."—Adjutant General's Office, War Department, Washington, File No. F-290-C.B. 1863. See also O. H. Browning to Fell, June 26, June 30, 1862.

¹⁰Rodney Smith to Captain E. J. Lewis, July 15, 1897. The letter is copied in full on pages 73-78 of *Lewis' Life*. Mr. Davis was later transferred to the office of Internal Revenue at Washington, there to serve under Fell's old friend J. J. Lewis. Davis to Fell, Oct. 18, 1863.

vis into his personal employ, giving Fell Rodney Smith, an experienced clerk, who had been in the service for some time. Smith remained with him during the time of his service, and at his request then became his successor.

The official records of Mr. Fell's service, which lasted about eighteen months, show that he remained in Illinois until late in September, when he made a trip to Fort Donelson to pay the Eighty-third Illinois Infantry. After returning to Illinois, he went to Camp Morton in Indiana in November, then spent six months in Kentucky and Tennessee, going from Paducah to Cincinnati about the first of August, 1863. In the spring of that year he had a short leave of absence. Remaining in Ohio after his return to work but a short time, he returned to Kentucky, to Covington and Camp Wild Cat. His last payment was made to the Forty-eighth Pennsylvania near London, Kentucky, on September 18, 1863. The condition of his private affairs was such at that time as imperatively to demand his attention, and knowing that there were others who were capable of doing the work without loss to the service, he resigned at Christmas time. The resignation was accepted, and Fell hurried from Washington to Normal, to look after an accumulation of both private and public business.¹¹

Scarcely had he arrived at home when his friends began to urge him to enter politics. The first public request was a "suggestion" in the *Pantagraph* of December 26, 1863, that he be sent to the next Congress as representative for the eighth district. In an editorial on January 26 his name was suggested again, with a repetition of the arguments in the first article. He replied at once that the public work he had already done had entailed a sacrifice of personal interests which he felt he could ill afford to make, and added, "while the district can boast of a Leonard Swett, my consent to be placed in such a position would indicate a recklessness of the public weal, not to say vanity, that I trust I cannot be capable of." Some of his friends refused to consider this answer final, and made out a petition, signed by a long roll of names, begging him to accept the nomination.¹² Al-

¹¹Major William Cumback to Fell, Feb. 4, 1864. Fell to his wife, Oct. 19, 1862, Feb. 23, 1863. Receipts, 1863.

¹²Mr. Fell, in his endorsement upon this paper, says he declined it "as incompatible with proper attention to my private affairs . . . & for the further reason that I had solicited another and a better man to become a candidate—To wit Leonard Swett." No date; about Feb. 1, 1864.

exander Campbell paused in his advocacy of the "True American System of Finance" long enough to urge Fell to run for Congress; John H. Bryant, probably feeling with Campbell that Fell might take the place of the sadly missed Lovejoy, begged him not to decline. But Fell was firm in his determination not again to enter public life. Shelby M. Cullom was nominated at the convention, and elected over John T. Stuart by a large majority. It may be mentioned here that Fell was again asked to stand for Congress in 1866, and once more refused.¹³

Throughout the war his support of Lincoln, with that of many other of the president's old friends in the West, was unswerving and practical. The partial emancipation message of March 6, 1862, drew from him a burst of loyal and affectionate congratulation, which reveals the whole-heartedness of his faith in Lincoln, at a time when even Illinois was rife with criticism. He took the stump again in the campaign of 1864, speaking with E. M. Prince at a series of meetings in country schoolhouses and village halls. But he declined the post of secretary of the state central committee.¹⁴

The news of the assassination of Lincoln came with a peculiar shock to the Illinois towns in which he had been a familiar figure, and in which there were scores of his personal friends. Fell heard of it as he returned from a business trip. Hurrying home, but not stopping to have old Tom unharnessed from the buggy, he told his wife the sad news, and then started back to Bloomington to verify the report and have further particulars. On the way he met his son Henry, took him into the buggy with him, and begged for details.¹⁵ The day after, the McLean County people expressed their sorrow at a great public meeting

¹³Alexander Campbell to Fell, Apr. 2, 1864. Bryant to Fell, May 14, 1864. Fell in the *Pantagraph*, Apr. 11, 1868.

¹⁴The *Pantagraph* of May 23, 1862, has an account of a public meeting held the night before, at which Fell spoke warmly in defense of the presidential policy, then much criticized. In August another great meeting of the same sort was held. Fell to Lincoln, Mar. 17, 1862. *Pantagraph*, Oct. 5 and Oct. 11, 1864. Lewis, *Life*, 80. Telegram from Thomas J. Turner to Fell, July 11, 1864. Lincoln to Fell, Oct. 5, 1860.

¹⁵Henry C. Fell, "When Lincoln Visited Normal," in *Normalite*, June 7, 1913.

held in the court house square, at which Fell presided and spoke.¹⁶

A very dramatic episode gave to the days that followed a lively interest, and may be related here because it illustrates a prominent trait of Fell's character. Rev. Charles Ellis, the pastor of the Free Congregational Church, was a New Englander of strongly abolitionist views. In his sermon of April 23, 1865, he essayed to speak upon the subject of the assassination and its causes. His audience, which numbered many personal friends of the dead president, was perhaps as keenly sensitive to the estimate placed upon Lincoln as any audience could have been. Mr. Ellis began by saying that he believed that before God Adams, Jefferson and Washington were more to blame for the murder than Booth, for they had admitted slavery at the time when the constitution was made. He then blamed Lincoln for so long supporting a constitution which protected slavery, and said that "he had not the moral courage to step forth like a strong man in his might and do what his better nature told him was his highest duty. He sacrificed the demands of God that he might not offend a political party in the land," with much more to the same effect.

In attributing the murder of Lincoln to his own fault in no uncertain terms, Mr. Ellis aroused the indignation of the Bloomington people to fever heat. Members of the congregation were so angered that they were scarcely restrained from creating a disturbance in the church. Mob violence was not unknown in Bloomington during the war, as the Snow brothers could testify.¹⁷ A meeting of the members of the church was held a few days later, for the purpose of demanding the immediate resignation of the pastor. Mr. Fell, however, spoke so forcibly of the

¹⁶On the day after the assassination President Edwards called a meeting to be held in the assembly hall of the normal school, at which Fell presided and spoke, it is said, with singular eloquence of his old friend.

¹⁷These two brothers, with their sister, the president of the Bloomington Ladies' Library Board, were considered to be among the finest people in the town, but were extremely unpopular because of their frank sympathy with the South. On one occasion, when recent recruiting had aroused patriotic feeling to fever heat, a crowd of men and boys bombarded the office of the *Times*, and destroyed it. They were not satisfied until "the crude little press and all the types were scattered on the street below." The Snows sued for damages, but could get no conviction. Luman Burr, interview in *Bloomington Bulletin*, July 6, 1913.

fundamental principle upon which that church had been founded—the principle of free speech—that he dissuaded the congregation from a step which would have denied it. The Congregationalists adopted instead a set of resolutions which he offered, in which they refused to censure the sermon, asserting the right of any man to express his ideas untrammelled in their church; and reproved the “mob” which had caused the disturbance on the Sunday before.¹⁸ Although thus formally vindicated, Mr. Ellis found public opinion so against him that his usefulness in the community seemed at an end, and he resigned within a few days.

¹⁸*Pantagraph*, May 6, 1865. It is said that Dr. McCann Dunn paid for printing of the sermon, that all might know exactly what was said, since highly colored reports concerning Dr. Ellis' words were promptly circulated. John W. Cook says of this occurrence: “This community has often had occasion to feel a sense of pride in the citizenship of Mr. Fell, but on this occasion he illustrated a degree of fidelity to a cherished principle that lifted him to the serene heights of supreme manhood. His heart was heavy because of the national calamity and he mourned the loss of his honored friend, but the principle of free speech could not be violated without his indignant protest.” *A Western Pioneer* (MS).

CHAPTER VII

PUBLIC SERVICE AFTER THE CIVIL WAR

Altho keenly interested in national affairs, it was always for the concerns of his community that Mr. Fell found deepest pleasure in planning and execution. In 1864 the people of the township in which he lived resolved to correct an old wrong that had caused great confusion and expense for many years. The corner marks usually set up by government surveyors could not be located in Normal township, and people came finally to the conclusion that only the outside boundaries had ever been properly run. Judge Davis, C. R. Overman, and Mr. Fell addressed a meeting on the first of October, 1864, and Mr. Fell secured the adoption of a set of resolutions, which, after reciting the conditions, recommended legislative action to secure a resurvey and an adjustment of all difficulties between those whose boundary lines conflicted. A petition was signed, a committee appointed to circulate it, and Mr. Fell was commissioned to present it at Springfield. He did this effectively, and the necessary bill was passed on February 16, 1865. A case in chancery was instituted accordingly, the next September, and a decree for the resurvey secured, the commissioners' report being confirmed by both lower and supreme courts.¹ The decisions which were thus reached in the most friendly and united spirit, doubtless saved endless expensive law suits and hard feelings. Perhaps no service of Mr. Fell to his community required more tact, foresight, and hard work to accomplish than this achievement of the resurvey of the township, or meant more to the people among whom he lived and worked.

On the same day on which he signed the resurvey bill, Governor Oglesby also approved a bill changing the name of North Bloomington to Normal. Under that name it was incorporated February 25, 1867, with a charter which embodied a perpetual

¹Samuel Colvin et al vs. Kersey H. Fell et al., *40 Illinois Reports* 418. The petition signed at the meeting is among the *Fell MSS.* It contains about twenty-five names, with subscriptions for the expense involved, of from twenty to twenty-five dollars. *Pantagraph*, Oct. 6, 1864. *Private Laws of Illinois*, 1867, III, 628-631.

no-saloon clause.² In making the deeds of sale to lots in Normal (and there is little land in the town which was not at some time owned by Mr. Fell) he had always stipulated that no intoxicating liquors should be sold upon the premises. Others who owned land were in sympathy with his ideas, and it was understood from the first that Normal should always be, as Bloomington was in 1854 and 1855, a prohibition town. In 1866 the growing town required a charter and its people wished it to include a clause guaranteeing the continuance of this policy. The legislature of Illinois was not so ardently temperate as Normal; and interests which hoped to gain advantage from the change, tried to induce it to omit the prohibition clause from the proposed charter. Hearing of this, Mr. Fell called a citizens' meeting at the Baptist Church on November 22, 1866, at which the people discussed the situation and adopted a set of resolutions, ready to hand as usual.³ At the suggestion of John Dodge, a close friend of Fell and a man thoroly in sympathy with his ideas, the people present signed the resolutions, and other signatures were secured before an adjourned meeting held on December 6. At this subsequent meeting a thoro canvass was reported, in which President Edwards of the Normal School had coöperated by securing the signatures of the students. Over nine hundred names appeared on the petition, the names it is said of every man, woman and child of six or over in the town. William A. Pennell was appointed to go with Mr. Fell to present it to the legislature, which granted the charter with the desired clause.⁴

Mr. Fell had been able by careful attention to his affairs largely to free himself of debt by this time, and so felt free to give some time to furthering the political prospects of his friends, and to take a rest which he felt that several years of unremitting labor had earned. Early in July of 1865 he received an invitation from General Thomas Osborn, who was in charge of the Twenty-fourth Army Corps at Richmond, to visit that city as the guest of the corps. He accepted this invitation, and while in the East went to New York and had an interview with Henry Ward Beecher. Upon his return he was busied with the test case

²*Private Laws*, 1867, III, 321-336. The seal was affixed to the charter Mar. 4, 1867.

³The resolutions are given, with an account of the meeting, in the *Pantagraph*, Dec. 19, 1866. Fell, letter published in the *Normalite*, Mar. 26, 1908.

⁴*Lewis, Life*, 57.

for securing the resurvey, spoken of before, and with efforts to facilitate the discharge of certain Illinois regiments.⁵

During the years following the close of the war Mr. Fell devoted much time and effort to the building up of Bloomington and Normal. He planted trees indefatigably, procured grants that improved and enlarged the normal school, and encouraged every enterprise which could bring desirable citizens or increased wealth to the sections in which he was interested. No public enterprise asked his aid in vain, it is said; certainly the list of his interests is a long one. During the first few years of his residence in North Bloomington, he planned to develop the new town as a manufacturing place as well as a school town. In 1857 he was much interested in the production of sorghum, for which people then predicted a great future. He planted it generously, set up a mill, with press, vats and reducing pans, and put his product upon the market. There was not, however, an encouraging demand for it, and farmers generally declined to trouble themselves with the crop, which required an outlay of labor incommensurate with returns. Mr. Fell after a time abandoned the experiment.⁶

At about the same time he secured the location of a foundry at North Bloomington,⁷ but this enterprise, after a career of

⁵C. Macalester to Fell, Nov. 7, 1864. Thomas O. Osborn to Fell, July 1, 1865. J. H. Bryant to Fell, Nov. 18, 1865. Lyman Trumbull to Fell, Dec. 27, 1866. Stephen A. Douglas to Fell, Mar. 21, 1866. Gov. Oglesby to Fell, Sept. 16, 1865. Fell to E. J. Lewis, July 26, 1865, quoting a letter from himself to Secretary Stanton. (Lewis letters, in MSS of the McLean County Historical Association.) These last letters referred to one published substantially in the *Pentagraph* of July 13, 1865, from Lewis, in which he complained of being compelled to lie idly in camp with all his men, after all action had ceased. Lewis could have been relieved at any time, but did not like to leave camp (at Meridian, Miss.) without his men.

⁶In 1842 and 1843, he had been interested in some experiments looking toward the making of sugar from Indian corn. No written account of these experiments remains. His conclusion was that the thing was possible, but not commercially profitable. Interview with Henry Fell, May 31, 1913.

⁷One Blakesly, his partner in this enterprise, built the foundry, and also the huge boarding-house which was to accommodate the workmen. Addison Reeder, a skilled mechanic and inventor, was brought from Laytown to be foreman and manager. Some cast iron fixtures, used in the construction of the normal school buildings, were turned out before the enterprise had to be given up, largely because of the impossibility of find-

many vicissitudes, was also given up, Mr. Fell deciding that Normal was destined not to become a manufacturing town. This was in spite of the fact that in 1867 two coal-shafts had been sunk, and had found coal, in or near Bloomington. Mr. Fell was financially interested in that one which was located near the Chicago and Alton tracks, and which has been operated successfully to the present time. One business venture which was a success from every point of view was the large hotel in Normal which he built in partnership with William A. Pennell. It was a four-story Mansard-roofed structure, with spacious rooms and wide verandas, and a ballroom that made it the social center of both towns. Good hostelries were rare, and this one became a landmark. It was burned in 1872, some time after Mr. Fell had disposed of his share in the ownership.

No enterprise upon which the state entered after the close of the war was of greater importance than the establishing of the state university. It has been noted that from the first efforts, sidetracked for the normal school and later deferred during the struggle between North and South, its friends hoped to have eventually one many-sided institution, wherein training of many kinds might be had. No sooner was the war well over, than the project was again urged upon Illinois. In Bloomington interest was especially keen, for there people thought that now the time was come for the expansion of the normal school into a real university. The funds made available by the Morrill Act would provide for the industrial university of which Turner and Fell had long dreamed.⁸

ing efficient workmen; and Mr. Fell became liable for the greater part of the loss of the venture. The plant was used about 1877 for the manufacture of a patent furnace, by one Ruttan, a Canadian, who was the inventor of a once-popular ventilating system. Neither the furnace nor the stoves, which then and later were turned out of the same factory, found a very good market. William McCambridge in the *Pantagraph*, Mar. 16, 1910.

⁸John F. Eberhart, in his contribution to the *Fell Memorial*, tells of an interesting but unsuccessful attempt to establish a great state university, early in the decade following the passage of the Morrill Act. There was to be a central school in Chicago, "with affiliated institutions throughout the state, especially at Normal. . . . Our plan was to get donations of \$100,000 from each of ten different men in the state and to have incorporated into the constitution of the state at the constitutional convention in 1870, a provision for the maintenance of the university. The \$1,000,000 had been duly pledged. Mr. Fell, himself, pledged \$100,000, and

The first legislative action for the school was a bill authorizing its establishment, and throwing open its location to bids. The bill was introduced in 1865, but was defeated. A similar bill was introduced two years later, providing for elections in counties or cities upon the question of raising money wherewith to make a bid for the location of a state university. This bill passed, and was approved by Governor Oglesby on January 25, 1867.⁹ In the meantime, however, other forces were at work to locate the school definitely at Urbana. After President Buchanan had vetoed the Morrill Bill in 1859 and before Lincoln approved it in 1862, Dr. Charles A. Hunt of Urbana conceived the idea of securing a state school for his own town. A "seminary" building was being erected then at the north end of what is now Illinois Field, and Dr. Hunt's plan was to use it for a larger and better endowed school than could be had by merely local support. He therefore wrote a memorial, which was signed by a large number of Urbana citizens, and which was presented to the legislature in January, 1861. This memorial pleaded for agricultural education on the two-fold basis of the elevation of labor and of public economy. The time was unpropitious for such an enterprise, however, and the memorial came to no immediate success.¹⁰

No sooner was peace restored than the citizens of Urbana set themselves anew to secure the industrial university, as it was then called. Jonathan Turner, long the leader of the movement, hoped that when it materialized this school would be at Jacksonville. Jesse Fell wanted it at Bloomington, a rounding out of the university which had been begun with the normal school ten years before. Several other communities in the state hoped to gain it, and made generous offers for it. But the Urbana people were both earliest in the field, and most resourceful in expedi-

had found six other men in the state who pledged \$100,000 each. I also pledged \$100,000 and found two other men besides myself . . . " John Wentworth, upon whom the two leaders had relied to push the project in the convention, grew cold in the cause, however, and it was given up. Probably Turner's plan to put the state university upon a constitutional basis appealed to Fell as a better idea.

⁹*Public Laws*, 1867, 122.

¹⁰The "Urbana and Champaign Institute" was incorporated by an act approved Feb. 21, 1861. *Private Laws*, 1861, 24-26.

Dr. Hunt entered the army as a surgeon and died at the hospital at Mound City in July, 1863. Joseph O. Cunningham, in the *Times* (Champaign, Ill.) of May 21, 1910.

ents. They introduced a bill definitely locating the institution at Urbana, providing the offer—therein recited—of the people of Champaign County were made good.¹¹ Other towns were indignant at this method, since it gave them no chance to compete. Bloomington felt especially aggrieved, for the success of the Urbana bill meant for them the death of a hope long cherished; and Jacksonville was hardly less angry, because it had supported Turner through the long years of his unsuccessful efforts. Not a little heroic sacrifice had entered into the generous donation of Bloomington in 1857, made when hard times were threatening and war seemed imminent. One of the arguments most used by those who had raised the money then was that in time other schools might be added until a real university were founded.¹²

Mr. Fell's own conception of the educational system of the state was a comprehensive one, involving a university comprising every necessary technical and cultural school, at the head of a system of common schools which included industrial training in their curriculum. Teachers, he said, would profit by the breadth gained by coming into contact with those who were in turn training for other kinds of work; and as education was a field as dignified as that of any other calling, it was practicable to make the normal school one of the colleges in the university. To supplement this theoretical justification, he set to work to raise a subscription which should rival, if not exceed, that of Urbana.

His efforts were now even more earnest, if that were possible, than they had been ten years before. He wrote a memorial presenting the claims of Bloomington, which was received by the legislature about the first of February, 1867. He and a number of others went to Springfield to use what influence they might to assure the acceptance, or at least the consideration, of the bid. The decision hung fire during the greater part of February, while the lobbies of Champaign, McLean, Morgan and Logan Counties pushed their respective claims. The people of Champaign County, knowing the manner of men they had to deal with in Turner and Fell, had elected to the legislature, especially for the purpose of pleading their cause, a man who was almost if not quite Fell's equal in powers of persuasion. This was Clark

¹¹*Public Laws of Illinois*, 1867, 123-129.

¹²*Illinois Industrial University: Report of the Committee* (pamphlet, no date); circular letter, Jan. 25, 1866; J. B. Turner, "Industrial University" in *Jacksonville Journal*, Feb. 8, 1866; subscription lists. All in the Turner Manuscripts.

R. Griggs.¹³ He was successful in his mission; Champaign County won the Industrial University. An inconsequential sop was thrown to the defeated parties in the shape of a supplementary bill, passed March 8, which provided that the trustees might locate the school in McLean, Logan or Morgan Counties if Champaign County failed to fulfill its contract, a contingency which, of course, never arose.

The new institution was, at first, scarcely more of a university than the normal school had been. It was small, poorly endowed, limited in curriculum and service. Its friends wanted to see it really fulfill the purpose for which it had been created. The Northern Illinois Horticultural Society, meeting in Bloomington on March 2, 1870, besides criticizing the struggling institution roundly, passed a resolution which showed its kindlier at-

¹³Petition to the legislature, signed by Jesse W. Fell and fifteen others of Bloomington and vicinity. *Illinois State Journal*, Jan. 17, 1867. The subscription as given in the petition was \$500,000; the *Pantagraph* put it at \$550,000. (Lewis, *Life*, 89). Mr. Fell gave \$15,000 of this, the largest single subscription except that of Judge Davis. There was a site of 140 acres, and many smaller cash subscriptions. Both this and the offer of Jacksonville exceeded that of Champaign County.

No shadow of reproach attaches to the methods used by Clark R. Griggs in winning friends for the Urbana location. There were open accusations of bribery at the time, however, which involved some members of the Urbana lobby. E. M. Prince, in his contribution to the *Fell Memorial* (p. 42) tells the story of the proposal of a bribe to the Bloomington men. He went one morning, he says, to Mr. Fell's room, where Fell was making plans for the day for the Bloomington contingent. He went over the names of the members of the legislature, speaking of the characteristics of each and of the kind of argument that would probably prove effective in each case. One man "said that Urbana had contributed quite a large amount of money to influence the members of the Legislature, but said that he thought a few hundred dollars from McLean County would give it to them, as the members preferred McLean to Champaign. Mr. Fell immediately spoke up and said, 'I am willing to procure a subscription that will be conceded to be the greatest of any of the towns, but I will not contribute a dollar to influence any member of the Legislature to vote for us. I will throw the whole thing up before I will have anything of the kind.'" See Prince's article in the *Pantagraph* of June 7, 1907.

See also affidavits, Jan. 25, 1867; G. W. Minier to Turner, Feb. 10, 1867; *History of the Champaign "Elephant"* by One of the Ring, broadside, dated in pencil, Mar. 21, 1867; certificate of expenditure by Henry E. Danner, Apr. 2, 1867. All in the Turner Manuscripts.

titude toward it. This was that the constitutional convention then in session should endow it by a constitutional provision.¹⁴

But Fell had anticipated this action. Representing the State Teachers' Association, he had addressed a memorial to the convention on the last day of January preceding, which expressed his ideas of possible means and measures. It did not dictate an exact scheme of support and management for the university, altho it suggested several. It appealed to state pride, urging that eight surrounding states had already established universities. It contained also a vivid prophecy of the service now actually rendered the state in the study of soils, entomology, engineering, agriculture, chemistry, mining methods, and the use of waste by-products. But he adds: "To accomplish these grand results, however, we must have, not a university in name—another pretentious high school—but what has not yet been fully organized upon this continent, a University in fact; a grand and comprehensive school, equal in its scope and power of development to our present and future greatness, and in harmony with the advancing civilization of the age. Anything that falls short of this, at least in its scope and constitution, is alike unworthy of us as a people, and of the age in which it is our privilege to live. The day of small endeavors in enterprises of this kind, and with people like ours, has passed away, never to return. WE WANT THIS OR NOTHING."¹⁵ Then follows a very

¹⁴Both Turner and Gregory were at this meeting. The latter invited the members to visit Champaign and see for themselves what was being done at the university. Turner's acceptance marked the beginning of his personal friendship for Gregory, and his hearty coöperation with him in building up the institution. Carriel, *Life of Jonathan Baldwin Turner*, 227-231. Joseph O. Cunningham, interview, May 10, 1914.

¹⁵Saying that its friends were not urging any special plan for providing it with funds, Fell mentions that fact that "some" propose to use for the university the five per cent of the Illinois Central; but another plan, if more acceptable, would be considered by the university party. "In view of the general desire to perpetuate the present relations of the State with the Illinois Central Railroad, in regard to the fund referred to, and of a morbid sensibility in the public mind in reference thereto, whenever any measure affecting the same, however remotely, is proposed, it may be wise, should you determine to provide for such an institution, to abstain from making even any allusion to that fund, and in lieu thereof, to provide that the one-tenth part of the two mill tax, or its equivalent one-fifth of one mill, shall be set apart to that object, after the extinguishment of our present state indebtedness. . . . By the im-

earnest reply to the chief argument being urged against such a plan—that the state was too poor to afford it. The plea was an eloquent one, but it failed to gain its point with the constitution-makers, who declined to saddle the state with any such “burden”.

Besides writing this plea for the teachers of the state, Fell traveled much in the interests of the effort, and wrote many letters. A draft of the proposed constitutional provision is found in a set of resolutions passed by the State Teachers' Association.¹⁶

sition, in this or some other way, of a slight tax, equal to the fiftieth part of one per cent and by deferring the collection of even that till our present bonded indebtedness is fully paid off, would seem to obviate all reasonable objections; and though it postponed for a few years a work already too long delayed, the friends of this measure hope by this concession, as to time, to receive not only your approval, but that of the people to whom your work is soon to be submitted.

. . . “We not only have nothing of this kind within our limits, but we are surrounded by six states, to wit: Michigan, Wisconsin, Iowa, Missouri, Kentucky, Indiana, to say nothing of two still younger States, Minnesota and Kansas—all of which have State Universities. True, Ann Arbor only has at present any just claims to this high rank; but may we not reasonably hope and expect, . . . that in time some, possibly *all*, of the States referred to may have their Universities in *fact* as well as in *name*? . . .”

. . . “What we mean by the term ‘University’, in that broad and comprehensive sense used to designate these the highest institutions of learning known in the world, is, in the language of Webster, ‘An assemblage of colleges established at any place, with professors for instructing students in the sciences and other branches of learning, and where degrees are conferred. It is properly,’ he continues, ‘a universal school, in which are taught all branches of learning, including the four professions of Theology, Medicine, Law, and the Arts and Sciences.’ To Americanize such an institution we should, perhaps, in present condition, at least, and acting for the State, have to drop the first of the professions above named, and incorporate, more thoroughly than is usually done, what is known as the *elective* principle—a principle largely adopted at Cornell and elsewhere, and which enables the student to strike out in any given direction he may desire, and thus fit himself for the active duties of life. . . .”

¹⁶Notes indorsed by Fell upon an envelope containing a copy of the Memorial. Henry Wing to Fell, Jan. 3, 1870; *Pantagraph*, Feb. 1, 1871; “*State University*”—*To the Members of the Illinois Constitutional Convention*”, reprint from the *Pantagraph* and the *Illinois State Journal*, in *Illinois Teacher*, XVI, 65.

In connection with the constitutional convention of 1870 one other occurrence is worthy of mention. Joseph Medill, a member of the convention, wishing to procure the strong influence of Governor Palmer in favor of the proposed change, asked Fell to call on the governor for an expression of opinion. This Fell did, in a letter published in May. About a month later the governor answered in a long letter which was a strong plea for the new constitution. This reply was widely published, and doubtless had much to do with the subsequent vote of the people.¹⁷

Altho his efforts for the location and endowment of the university failed, in another direction Fell succeeded better. The legislature in 1865 authorized the erection of a soldiers' orphans' home, which was to be located by a commission. Fell, deeply disappointed at the failure to build up the longed-for university at Normal, set briskly at work to secure this smaller institution for his own community. There was an initial appropriation of a hundred thousand dollars made by the state, to which he secured an addition of fifty thousand in local subscriptions, heading the list with a generous donation. Rock Island, Decatur, Irvington, and Springfield competed for the home, but the Normal subscription was the largest and the commissioners decided unanimously in its favor, May 5, 1867.¹⁸

Mr. Fell's connection with the Soldiers' Orphans' Home did not end with its location at Normal. Saying that, as homeless and almost friendless children, they would have mainly to depend upon their own exertions for a livelihood after their dismissal from the Home, he claimed, that it was both wisdom and obligation in the state to give to its charges not only a shelter, but a training that would make them self-supporting upon reaching maturity. In other words, he wanted the school which was conducted at the Home to be a trade-school. But vocational education was at that time almost unknown in the United States, and was looked upon with disfavor as a dangerously paternal institution. No trades were taught at the Soldiers' Orphans' Home,

¹⁷Palmer to Fell, June 18, 1870.

¹⁸A characteristic story is told of this canvass, concerning Fell and Davis. Seeing his friend as he approached the office, Judge Davis declared to Lawrence Weldon, who tells the story (*Fell Memorial*, p. 40)—“There's Fell. I reckon he wants me to subscribe more money. I won't do it. I won't do it. Reckon I'll have to, though.” Fell did indeed induce him to increase his already generous subscription.

and Mr. Fell was thereat much disappointed. "Don't call it my school," he is said to have rejoined when a friend asked him how "his school" prospered. "It is not what I wanted it to be." Thirty years after its founding, those features which he had sought in vain to incorporate, were added to the Soldiers' Orphans' Home school.¹⁹

A somewhat similar project under private management failed to materialize. This was the "College for Soldiers and their Sons" which was to occupy the buildings of Western Union College and Military Academy at Fulton, Illinois. Mr. Fell held some stock in the company advocating this scheme, but seems never actively to have pushed it.

Shortly after the dedication of the Soldiers' Orphans' Home, a competition for a state reform school was opened. Mr. Fell started a subscription in Bloomington, which reached a total of over sixty thousand dollars.²⁰ There was at that time, however, a strong opposition to the policy of concentration which he advocated. The state was still imperfectly unified, and state institutions were regarded as the perquisites of citizenship, to be distributed as equally as possible. The interests of the institution were a secondary consideration. The prejudice against the policy of concentration was so strong, in fact, as to persuade Mr. Fell of the wisdom of abandoning his efforts to locate the new institution in Normal. He did this the more willingly, perhaps, because the people of another town in which he was interested began to hope that they might win it. This town was Pontiac, where Mr. Fell had owned land for many years. He found enthusiastic response when he started to raise a subscription there, and was able to induce the township to vote bonds to the amount of twenty-five thousand dollars, to which the board of supervisors added twice as much in county bonds. He and his brother Kersey offered the site for the buildings, sixty-four acres lying close to the town. The total subscription of over ninety thousand dollars won the location of the school.²¹

¹⁹E. M. Prince in *Fell Memorial*, 41.

²⁰Based on the "Classification of the Normal Bids for the State Industrial Reform School" among the *Fell MSS*, and exclusive of five subscriptions dependent upon a particular location. Lewis says (*Life*, 99) that the subscription was \$35,567.

²¹*Pantagraph*, July 8, 1869. The *Fell Papers* include the subscription list and map used in the campaign. Comments by Mr. Fell are to the effect that "we did not regard such an institution as a *junior penitentiary*,

The last state institution for which Fell and the Bloomington community made a strong effort, was the Eastern Illinois Insane Asylum. The location of this institution was before the people in 1877. Mr. Fell, chairman of the committee appointed to direct the efforts of the Bloomington people, made a report of the advantages of location there, which was printed in the *Pantagraph* of August 3, 1877. Its chief interest for us lies in its advocacy of advantage to the state as a whole rather than to any one region—his old argument of “concentration versus scatteration.” Modern ideas of efficient and economical management counted for so little at the time, however, when opposed to sectional jealousy and local ambition, that the really excellent inducements offered by Normal were declined in favor of the town of Kankakee. Probably the same reasons accounted for the fact that a committee composed of Jesse Fell, Lawrence Weldon, and Hamilton Spencer, appointed in 1885 to investigate the chances of Bloomington for securing the projected home for the feeble-minded, did not make a campaign for the institution.

but, as the name implies, as a *reformatory institution*.” Fell presented to Pontiac the land for a city park, which was named for him in 1915. *Pantagraph*, June 7, 1915, quoting from *Pontiac Leader*.

In 1871 occurred one of those movements for changing the capital which often take place in states in which the center of population is still shifting and uncertain. In March of that year, Peoria made an effort to have the capital moved to that place. The discussion evoked many statements of the shortcomings of Springfield, and when it became evident that the idea was to be thought of seriously, Bloomington people had a meeting in their court house “to consider the question of making an effort to have the capital brought here”. After the explanatory speeches a committee, of which Mr. Fell was a member, was appointed to prepare an appeal to the legislature. The committee probably made inquiries before doing the bidding of the townspeople, for nothing further came of it. Lewis, *Life*, 101.

No account of Mr. Fell's service to his community could be complete without mention of his unremitting efforts for the colored people of Normal. He secured work for them, employing many himself, and then showed them how to save and invest their earnings in homes, encouraging them to educate themselves and their children, and constituting himself advisor and friend in their struggle for betterment. Largely as a result of his interest in them, the colored people of that community have become as a class self-respecting and property-owning citizens. Notes on interview with George Brown, May 15, 1916.

CHAPTER VIII

RAILROADS

Mr. Fell's active efforts in behalf of railroads for Central Illinois seem to have begun in 1835, when General William L. D. Ewing sent a number of Bloomington men a request for their coöperation in building the Illinois Central Railroad. This document was addressed to the leading men of Bloomington, "Gen. Covell, J. W. Fell Esq., Jno. W. S. Moon, Esq., Doct. Miller &c."¹ It apprised them that General Ewing proposed to present at "the called session of our General Assembly" a bill for a railroad from "Ottawa, or some other suitable point on the Illinois river, through Bloomington, Decatur, Shelbyville, Vandalia, and thence to the mouth (or near it) of the Ohio river on the most practicable and convenient route." He asked their opinions on the matter, and indicated a willingness to appreciate the coöperation of McLean County people. Nothing came of this early project. A little later Fell became one of the incorporators of the Pekin, Bloomington, and Wabash Railroad, which was to unite the Illinois and Wabash rivers.²

The Illinois Central Railroad became the backbone of the elaborate internal improvement bill of 1837, was taken up by the Great Western Railway Company in 1843, and was the especial care of Senator Sidney Breese during 1843-1850. Senator Douglas finally succeeded in endowing it by a grant of public lands, in September, 1850, and construction began December 23, 1851.³ In the congressional grant, the termini of Galena and Cairo were stipulated, but the course of the road between these two points was left open. Powerful influences were endeavoring to change it from Ewing's proposed route eastward and westward, and particularly to Peoria and to Springfield. Fell's candidate, General Gridley, elected to the state senate in 1850, worked untiringly to maintain the original route through Bloomington, and finally succeeded in securing a clause in the act of incorporation with this provision. This was in February, 1851. The railroad

¹Oct. 20, 1835.

²*Private Laws of Illinois*, 1836, 8-12. E. M. Prince in *Fell Memorial*, 43.

³Brownson, *History of the Illinois Central Railroad*, 18-48.

was to pass through Clinton and Decatur, towns in which Mr. Fell was much interested, as well as through Bloomington. In the spring of 1852 the road was started northward from Bloomington to meet the line already begun from LaSalle southward. Regular traffic on the completed road began May 23, 1853.⁴

On the day when ground was broken near David Davis' home for the Illinois Central Railroad,⁵ engineers were locating an extension of the Chicago and Alton (then called the Alton and Sangamon) from Springfield to Bloomington. Work progressed so rapidly that trains were running on this road just five months from the date of location. Passengers from St. Louis could change at Bloomington to the Illinois Central and again at LaSalle to the Rock Island route, and so to Chicago. At Bloomington there was no direct connection for many years between the Chicago and Mississippi, of which the Alton and Sangamon was a branch, and the Illinois Central. The transfer was by cabs and omnibuses.

In 1853 Fell secured the right of way for the Chicago and Mississippi from Bloomington to Joliet, and work began promptly. Fell, who had lands along this route from which he hoped to reap a profit, also secured from O. H. Lee, who had charge of the building of the extension, a contract for himself and his brother Thomas, to furnish ties and cord-wood. The sale of lands in and around Pontiac, Lexington, Towanda, Normal, and Joliet, of course netted him handsome returns for the investment of time and money for the Chicago and Alton. Indeed, the dove-tailing of enterprises, the working-together-for-good of all the forces that made for prosperity, was an accomplishment for which he had a peculiar talent.⁶

In the meantime, ten and a quarter acres of ground had been conveyed to the Chicago and Mississippi for the depots and shops which have since helped to make Bloomington in a small way an industrial center. Many citizens wanted the station-house of the new road built close to that of the Illinois Central, with the point of intersection near the present site of the Wesleyan University. But Fell, with an eye to the founding of a suburban town at the intersection of the two roads, at a point farther west where he and others had secured land, stood for its location at a considerable distance. The Bloomington station

⁴*Bloomington Intelligencer*, May 25, 1853.

⁵May 15, 1852.

⁶O. H. Lee to Fell, July 4, 1853. *Pantagraph*, Apr. 18, 1908.

was located about a mile from the Illinois Central station, and the intersection formed a center for the new town of North Bloomington.⁷ On August 4, 1854, the *Pantagraph* announced that trains were running from Alton to Joliet, the full length of the Chicago and Mississippi.⁸

Central Illinois needed in addition an east-and-west road. In 1853 Fell and others organized a company to realize a projected "Wabash and Warsaw" railroad.⁹ On the third of May he addressed a meeting at Carthage favoring a proposed road from LaFayette, Indiana, through Bloomington, Pekin, and other Illinois towns to Warsaw. Bloomington citizens subscribed fifty thousand dollars to the stock by the middle of June, and the county court ordered a vote on a county subscription of a hundred thousand. The fifty thousand dollars, however, were rejected later on technical grounds, and the order of the court was revoked accordingly. The enthusiasm that had been so general died out suddenly at this rebuff, and was reawakened later with some difficulty.

Mr. Fell had much opposition during this period from those who would not be served by a road of the proposed route. A Pekin paper questioned his motives in advocating a road through towns in which he had holdings. The *Bloomington Times* also attacked him vigorously, but was answered by Mr. Fell himself in the *Intelligencer*.¹⁰ He had by this time become the local director of the proposed road. In September he urged the subscription of the fifty thousand dollars at a meeting at the court house, and the subscription of a like amount to another proposed road, the Quincy and Bloomington. He then entered into an ac-

⁷John H. Burnham, *Our Duty to Future Generations*. An address delivered Apr. 21, 1905, at the I. S. N. U.

⁸The tracks of the Chicago and Rock Island were used from Joliet to Chicago until March 18, 1858, when the road transferred to its own tracks. Lewis, *Life*, 42.

⁹The *Intelligencer* of Mar. 23, 1853, gives the names of the corporators of "The Bloomington and Wabash Valley R. R. Company" as follows: David Davis, Isaac Funk, James Miller, A. Gridley, E. H. Didlake, R. O. Warriner, John W. Ewing, W. H. Temple, Wm. T. Major, John Moore, John E. McClun, Jesse W. Fell, J. H. Robinson, A. Withers, Wm. T. Flagg, W. H. Holmes. The issue of April 27 has an account of the meeting at which Mr. Fell was sent "to the western part of the route" to interest people in the venture. See also issues of May 18, July 20, Aug. 10, Aug. 24, 1853; *Pantagraph*, Apr. 26 and June 28, 1853.

¹⁰*Intelligencer*, Aug. 3, Aug. 24, Sept. 12, 1853.

tive personal campaign to secure the money. The city voted it almost unanimously on October 15. Large subscriptions had been made in Tazewell County, Keokuk, and LaFayette, so that the total amount by December 14 was over a million dollars.¹¹

Despite all these efforts the road was not built. In March, 1854, it was announced that steps had been taken to let the contract of construction; but construction did not follow.¹² In the winter and spring of 1855-56 more meetings were held in the towns along the proposed route, and Mr. Fell with others again circulated the ready subscription-list. But people were tiring of the subject, and there was little success. A new company was incorporated in 1855, for the building of the Bloomington, Kankakee, and Indiana State Line Railroad, with Mr. Fell as a leading stockholder and worker.¹³ It also failed to secure popular support. Then in 1857, when the panic had added to the usual chariness in giving to public enterprises, a futile attempt was made. At the November election, a proposal that the county should subscribe a hundred thousand dollars was defeated by a vote of 1570 to 1166.

The east-and-west road was not again actively advocated until 1866, when a number of Danville people began to push the project. There were several groups, each urging a different route, as usual; but those who proposed a road from Danville to Bloomington through Urbana and LeRoy were most active. Another projected road passed directly from Bloomington to LaFayette, through Cheney's Grove. The Tonica and Petersburg line of the Chicago and Alton, already partly constructed, might be deflected, urged Mr. Fell and others, to Bloomington. Fell spoke in favor of this scheme at a meeting on December 29, 1866, using a map—a favorite device—to show his meaning.¹⁴ The resolutions he offered at the close of his speech were adopted. They endorsed the idea of the road and appointed a committee to sound the community concerning the hundred thousand dollar subscription. It proved to be very difficult to secure pledges, partly because many people believed that the road would come in any case, and the spending of so much money was therefore use-

¹¹*Intelligencer*, Dec. 14, 1853.

¹²*Pantagraph*, Mar. 15, 1854.

¹³*Private Laws of Illinois*, 1853, 342-346. At about the same time Mr. Fell and others incorporated the Bloomington Gas Light and Coke Company. *Ibid.*, 1855, 650.

¹⁴*Pantagraph*, Dec. 29 and 31, 1866.

less. An accusation was made against Fell and Gridley, touching their disinterestedness in the matter, to which Fell replied by publishing a letter from T. B. Blackstone, the president of the Chicago and Alton; and the canvass went on. President Blackstone convinced Mr. Fell that the new road would be built through Washington were the money not subscribed at Bloomington.¹⁵ In April, Fell succeeded in securing a joint appropriation of seventy-five thousand dollars from the township and the city. In June the township voted a hundred thousand dollars each to the "LaFayette, Bloomington and Mississippi" and to the "Danville, Urbana and Pekin" roads.

Then followed busy days in Bloomington, for there were three railroads being built. The one from Jacksonville was completed for traffic on August 14, 1867.¹⁶ The Danville road from Bloomington to Pekin was completed in 1869, and to Covington on September 2, 1870, giving railroad communication between Indianapolis and Peoria. The other east-and-west road, of which General Gridley was president and Fell an active director, was less fortunate. Financial support was hard to find, but work began in spite of this in October, 1869. The contractors, Howard and Weston, had promised to finish the road to the Indiana line by January 1, 1871; but the company failed early in 1870. A new contract was let, but it was only partly fulfilled. The Wabash company finally finished the road, which established regular service on July 13, 1872. So at last, after efforts extending over twenty years, east-and-west communication by rail was realized. It was not in a form so direct as Mr. Fell and his colleagues had hoped to have it, but it has proved practicable and helpful.

It has been noted that the Chicago and Alton Railroad established shops at Bloomington soon after entering the town. These shops were largely destroyed by fire on November 1, 1867. Almost at once, it was proposed to rebuild them in Chicago, or some other city where labor might more easily be had. The loss to Bloomington would have been very great, and Mr. Fell with some friends set himself to find the means of making their retention sure. Judge David Davis, General Gridley and Mr. Fell induced R. E. Williams, then local attorney for the road, to go with them to Chicago for an interview with President Blackstone. The latter assured the trio that, altho feeling for re-

¹⁵Blackstone to Fell, Dec. 13 and 28, 1866, Jan. 1, 1867.

¹⁶This road was leased to the Chicago and Alton for 99 years in June, 1868.

moval was strong in the company, he himself favored the retention of the shops where they had been, if only additional land for needed extension could be secured. This reasonable request surprised the Bloomington men, who had expected to be asked for a bonus in money. Returning to Bloomington, the matter was presented to the people at a mass-meeting on November 26. General Gridley and Mr. Fell spoke; the latter had, as usual, resolutions to be adopted and a definite plan for raising the money. Many in the audience signed the guarantee that night, and within a few days the number of guarantors reached 740. After much negotiation, the citizens agreed to give about thirty acres of land, some of which had to be gotten by condemnation proceedings. The railroad company advanced the money to pay for it, at the usual rate of ten per cent. The new shops were larger and better than the old, and correspondingly more valuable to Bloomington.¹⁷

One other enterprise of a similar nature remains to be recorded. In 1867 a number of people began to discuss the building of a street railway from Bloomington to Normal. A member of the board of education who lived in southern Illinois objected that the noise of cars would disturb the scholastic quiet of the community, but people in general thought it a good idea.¹⁸ A company was incorporated, to which was given a franchise to build the railway through Bloomington, Normal, and the campus. It was operated at first by a dummy engine, later by horse and mule power. The cars ran every forty minutes until nine o'clock at night.

The purpose of presenting the somewhat detailed accounts of enterprises in which Jesse Fell was interested, which have filled the pages of this chapter and the preceding one, has been to show by what means the leaders of the era of settlement in the Middle West managed to achieve results which appear marvelous in whatever light they may be seen. Fell was but one of a host

¹⁷To raise the money required, the Bloomington constituency framed a bill authorizing an issue of bonds. It passed the General Assembly, but was vetoed by Governor Palmer on grounds of unconstitutionality. A committee from Bloomington visited Palmer, and after explaining the situation to him, received his promise not further to oppose the bill. They worked to secure a repassage, succeeding only after much lobbying in the senate. The bonds were paid duly, with no question of their validity.

¹⁸P. G. Roots to Messrs. Hatch and Fell, May 23, 1867.

of workers who changed the wilderness into a land of settled institutions within the measure of a generation. Few men, perhaps, united so many qualities of leadership as he possessed; but the difference between him and other men in this respect was one of degree rather than of kind. It was a period rich in social service, altho "social service" had not then become so much of a conscious slogan as it has been since. It was a period when people were closer to the government than they are now, when living was simpler, when the machinery of civilization was formed by popular effort, in a more direct way than has been the case in later years; when men of limited means and many interests laid the foundation for economic and political achievement carefully and solidly, knowing what structure they reared and conscious that what they wrought would shape in great measure the future of their commonwealth. It is as a type of such men that Jesse Fell has real significance for the people of the Middle West.

CHAPTER IX

THE RELIGIOUS LIBERAL

The Unitarian movement in New England had its parallel among the Quakers in the Hicksite schism, begun in 1827 by Elias Hicks, a brilliant and influential Friend. He denied the deity of Christ and the special inspiration of the Scriptures, tenets held by the orthodox Friends. Rebecca Fell, Jesse W. Fell's mother, was a warm friend and admirer of Elias Hicks, and followed him into the sect which he established. The father, however, while he left the orthodox meeting at the same time, did not become a Hicksite, but united with the Methodists, whose creed agreed more nearly with his own personal belief.¹ The father became an exhorter in his new church home, the mother a preacher among the Hicksites. The harmony of the family was in no wise disturbed, for both parents were tolerant and not disposed to exaggerate differences. Some of the children followed the father, some the mother in their religious faith. Jesse, whose special privilege it was to accompany his mother to meeting on First Days and Fourth Days, came closely to sympathize with her in her religious ideas; and his activity as a leader of liberal religious thought in his community in after years, may largely be attributed to the influence of his mother's teaching and example. She was a woman of vigorous mentality, altho of but rudimentary education, as were most of the women of her time. With her husband, she centered the training of her children about the necessity of uncompromising honesty, universal freedom, and fidelity to conviction.²

After removing to Bloomington in 1837, the Fell family continued to hold meetings after the fashion of Friends, altho

¹At this time, the simplicity of dress and manners of the Methodists was very like that of the Friends, and such a transition was easily made, entailing little change of accepted doctrine or custom.

²Jesse Fell to Fell, Sept. 2, 1832. This letter shows the intensely religious nature of Jesse W. Fell's father. It describes a camp-meeting in which he had taken part with great pleasure and profit, and expresses the tenderest wishes for his son's spiritual welfare. Another letter of Fell's father, dated Jan. 6, 1835, shows similar characteristics.

there were few of their faith in the town. The meetings were held on Sunday afternoons at the house, and the attendance was such as often to crowd the rooms. John Magoun, beloved by everyone who knew him and an especial friend of the Fells, came to these Quaker gatherings. The elder Mrs. Fell's voice was often heard in admonition, and her husband's, altho he was totally blind, in song. In his youth Jesse Fell the elder had been a famous singer in his community, and in his old age his voice was still sweet.

Under such influence, it was inevitable that Mr. Fell's religious faith should be both simple and strong. Wherever he was, at appropriate times and places he joined people of many denominations and shades of belief in their worship; and in all his life there appears no word of intolerance for the beliefs of others. His temporary connection with the Methodist Episcopal church at Payson has been mentioned on another page. Upon his return to Bloomington he did not unite with any church, altho he attended the "West Charge" Methodist church, then under the care of James Shaw.³

It is significant of the character of the people of Bloomington that there were in the town a great many of differing views but tolerant dispositions, who during the early years were drawn together for purposes of worship. Westerners were usually affiliated, when they had religious affiliations at all, with the more radically evangelical denominations. In Bloomington there had been a Congregational church of abolitionist leanings for many years, and Baptist and Methodist churches which, altho they contained many families from the South, were for the most part opposed to the extension of slavery. In 1855 the more radical element in the Presbyterian church had separated itself from the mother church, and formed the Second Presbyterian church. Thus clearly, during the decade, the political and sectional prejudices held by people generally affected their church affiliations.⁴

On the evening of the tenth of July, 1859, a group of people who were interested in forming a religious organization to which Christians of differing creeds might belong, met in the office of Kersey Fell. There were about twenty in attendance. Eliel Barber was chairman, Jesse Fell secretary. The result of the

³James Shaw in *Fell Memorial*, 4.

⁴Dr. John W. Cook, *A Western Pioneer*. Address at the semi-centennial of the founding of the Unitarian Church in Bloomington, Oct. 3, 1909. (Manuscript in possession of the author.)

conference was that the secretary was directed to write to Rev. Charles G. Ames, of Boston, asking him to come to Bloomington to look the field over. He came, preached a series of eight sermons, and visited the people who were interested in the possibility of forming a new church. He made his home with the Fells while in Bloomington, and became a very dear friend of that household.⁵

A church, known at first as the Free Congregational Society, was organized on the seventh and eighth of August. Many shades of Protestant belief were included. There were Universalists, Friends, Campbellites, Baptists, Episcopalians, Congregationalists and Spiritualists among the members.⁶ The resident clergymen of Bloomington were invited to preach for them until the new pastor, Mr. Ames, could take up his work.

Phoenix Hall was used for the services of the new church for almost ten years. Here the pastors, for the most part New England men, nurtured anti-slavery sentiments and fostered devotion to the federal union. Rev. Ichabod Coddington, the fourth pastor, was a fearless abolitionist, and spoke boldly his progressive views. During his pastorate, which like those of most Western pastors was a short one, the society dedicated its house of worship, on March 15, 1868. Other ministers succeeded Mr. Coddington—free and fearless speakers and thinkers for the most part, reformers rather than pastors, intellectual guides whose brief stay in the community served to waken thought and to deepen religious faith. Two of them, Rev. C. C. Burleigh and Rev. J. F. Thompson, a New Englander and an Englishman, became strong friends of Mr. Fell. Mr. Burleigh, a friend of the poet Whittier, was a quiet man of great spiritual force, but a man who gained no de-

⁵Ames to Fell, July 15, 1859. Ames to E. M. Prince, Sept. 23, 1899. Vickers Fell to Fell, Mar. 4, 1862. J. J. Lewis to Fell, Mar. 2, 1862. It was Mr. Ames, a radical New England abolitionist, who preached the famous sermon known as "the funeral sermon of John Brown". It was delivered on Sunday, Dec. 4, 1859, was printed in the local press, and afterward in a pamphlet which had wide distribution. His personal estimate of Mr. Fell is given in the letter to Mr. Prince just cited. C. G. Ames, in the *Christian Register*, Mar. 18, 1909.

⁶At a meeting held at the close of the regular service on the seventh of August, attended by about fifty people, Fell presented a set of resolutions looking toward the organization of the church. He and Kersey Fell, Mr. Phoenix, Mr. Stillwell, and others talked, after which the resolutions were adopted. Thirty-two people entered the society the next night, twenty more on August 14. Dr. J. W. Cook, *A Western Pioneer*.

gree of popularity in the hustling Western town in which his lot was for a short time cast.⁷ Mr. Thompson, who followed him, was on the other hand most acceptable to Bloomington, and later became immensely popular in Los Angeles. In speaking of the friendships which came to Fell through his church relations, it is meet here to mention Robert Collyer, with whom he often consulted and who became a valued personal friend.⁸

During the years after its founding the church gradually lost its composite congregational character, and became more homogeneous in belief. Unitarian doctrines came to be the prevailing opinion of the congregation. The name was therefore changed on December 9, 1885, to that of the "Unitarian Church of Bloomington." Mr. Fell remained an active member and constant attendant of this organization as long as he lived.

⁷"Give him," wrote Robert Collyer to Fell in 1873, in introducing an English clergyman who was viewing the sights of America, "if you can, a chance to meet Charles Burleigh. He may not otherwise see one of the Old Ironsides." Rev. Burleigh had preached in Pennsylvania many years before upon the subject of slavery, and the Fells had known of him then. "... last third-day evening we all (a few excepted) repaired to the Meeting-house where we heard a very interesting and eloquent speech delivered by Charles Burleigh on the subject of immediate emancipation. He is employed by the anti-slavery society of Philadelphia to deliver lectures on that subject; he is the most profound reasoner I ever heard. And if dignity of manners, eloquence, and sound reason can do anything to promote the cause, he is well adapted to the office." Rebecca Fell to Fell, Christmas, 1836.

⁸Robert Collyer to Fell, July 3, Sept. 18, Nov. 8, 1866; June 7, 1870; Sept. 15, 1873. A spirited letter upon "Broad-Gauge Theology", containing a clear defense of his liberal beliefs, appeared in the *Pantagraph* of February 15, 1868.

CHAPTER X

LATER POLITICAL ACTIVITIES

The congressional campaign of 1868 was one of especial interest to Mr. Fell. In March, an editorial in the *Pantagraph* had again proposed his name as a candidate for Congress, a proposal which received the usual short shrift from him.¹ The public request was repeated, and again declined. The Republicans of McLean then asked General Giles A. Smith to be their candidate, and he accepted. Fell, however, thought this a false and foolish move, inasmuch as Shelby M. Cullom, the member then sitting, was a tried and proved man. There followed a lively controversy between the Cullom-Fell party and the Smith adherents, waged both in the newspapers and in all public and private places where Republicans gathered for council. The county committee called a mass-meeting for the purpose of selecting and instructing delegates to the district convention. It met on the eleventh of April, but was so tumultuous a gathering that little business could be transacted. General Smith seems to have had control of the party machinery, but the machine was so powerfully opposed by Fell and his colleague Gridley, that none of the routine business decided upon could be forced through. A delegate county convention was therefore called, to meet on the twenty-seventh; and the war between Smith and Fell continued. The friends of Smith published a vigorous attack entitled "The Other Side," to which Fell replied as vigorously.² When it met, the second county convention proved more tractable than the first had been, and nominated Smith as McLean's candidate. Fell continued his exertions throughout the district, however, and on the fourth of May the friends of Cullom were gratified by a vote of five counties to two in his favor, at the district convention. He was elected by a large majority in November.

The story of this congressional struggle in McLean County illustrates a condition of division which was fairly typical of the

¹Lewis, *Life*, 92.

²*Pantagraph*, Apr. 9, 10, 11 for the notice of the mass convention; Apr. 11, article by Fell answering attack in "The Other Side"; other interesting matter in issues of Mar. 25-30, 1868.

situation of the Republican party in Illinois after the war. The unity which only a great common purpose can give, had passed away with the coming of peace. Discontent with the extreme congressional reconstruction policy, altho not then so decided as later, had begun to appear; Johnson's foolish blunders had complicated the situation. Locally, many men aspired to the honors which the Republicans had to distribute. The struggle for the nomination to the governorship, for instance, was unusually sharp. Robert G. Ingersoll, who had expected to be a candidate for attorney general, upon the report of the withdrawal of Palmer decided to try for this higher office.³ In the convention, however, Palmer took the nomination away from him and also from Jesse K. Dubois and S. W. Moulton. Governor Palmer's advocacy of states' rights divided the Republican ranks to some extent, and finally resulted in his leaving the party in 1872, with some adherents.

In 1870 a bitter quarrel arose between Mr. Cullom and Mr. Fell, which resulted in Cullom's defeat in his race for reelection. The cause of this difference was Cullom's appointment of John F. Scibird as Bloomington's postmaster. It will be remembered that the firm of Scibird and Waters sold the *Pantagraph* to Davis and Fell in August, 1868. Scarcely was the sale made, when Scibird and Waters began to plan the publication of a rival Republican paper, which appeared, under the name of *The Leader*, the next December. Fell and Davis regarded this as a breach of faith in their rivals, inasmuch as they had purchased the *Pantagraph* with the understanding that they were buying the Republican paper of Bloomington; and the two newspapers soon worked up a rivalry as spirited as usually develops under such circumstances. Added to this circumstance were other considerations which gave Fell a much stronger reason for resenting Cullom's appointment.

³Ingersoll to Fell, Mar. 25, 1868. Another letter, dated four days later, establishes Fell's position as favoring first Moulton, then Corwin, and last Ingersoll himself. "In the meantime," says the irrepressible Peorian, "dear friend, stick to your tree planting. There is nothing like agriculture and horticulture. Stay in the beautiful fields. Hear the birds sing praises to Corwin and Moulton. I would rather the birds would do it than to have you. I know that you will enjoy yourself a great deal more working in the garden than meddling about the governor question." There is more of the same tenor, and finally this postscript: "Now is the time to plant trees. All should be planted before the 6th of May."

General Gridley had asked in return for the assistance he had given Fell in supporting Cullom in 1868, Fell's influence in favor of the retention of Gridley's brother-in-law, Dr. Cromwell, as postmaster. Dr. Cromwell was a good postmaster, but his appointment by Andrew Johnson was with difficulty confirmed by the senate, as were many other appointments by that unpopular president. Mr. Fell, seeing no good reason for opposing his re-appointment, urged it upon Cullom, and received what Fell understood to be his promise that he would retain him. But for some reason Cullom changed his mind, and after Grant's election Seibird was given the appointment. Added to this was the fact that Fell had urged Cullom's renomination in 1868 with the understanding that he was not to run again. These considerations put Fell in the position of a man who must either vindicate his own honor or impeach that of others, and he took a course calculated to clear himself of suspicion.

Cullom repeatedly acknowledged at the time that he owed his nomination in 1868 to the efforts of Fell and Gridley. The equally vigorous opposition which the *Pantagraph* and its guiding spirit evinced two years later, made his prospects hopeless in McLean County, and doubtful throughout the district. McLean declared for General John McNulta, but the district, after a bitter struggle lasting through the summer, nominated Colonel Jonathan Merriam of Tazewell. Mr. Merriam was a man of fine character but comparatively unknown, and was defeated in November by the Democratic candidate, James C. Robinson. The fact that the division among the Republicans had resulted in Republican defeat did not tend promptly to heal the wounds among the factions. Nevertheless Fell and Cullom found that mutual explanations removed the cause of their personal differences, and they became again the best of friends.⁴

Although his informal and unadvised ways of doing things were distinctively Western and might have been expected to win a degree of approval in that section of the country, the four years of Grant's first administration seem to have aroused as much criticism in his own state as in any other. There was in Illinois a strong Southern element which, altho it had not made the state disloyal during the great struggle, still felt much sympathy for the subdued states, subjected to the indignities of military

⁴Mr. Fell's own account of the controversy to that date is in the *Pantagraph* of July 22, 1870. Shelby M. Cullom to the writer, Mar. 15, 1912.

and carpet-bag rule. Sumner, toward whom Grant had behaved with what most people considered inexcusable injustice, was nowhere more beloved than in the Middle West, where he had long been a popular hero. And the best men everywhere were dissatisfied with the position of the party leaders upon the civil service question.

Carl Schurz was the guiding spirit of the Liberal Republican movement of 1872, and its strongest adherents were in those states where his influence, and that of his friends, was strong. His election to the senate in 1869 was the first sign of the triumph of a new set of ideas in the Republican party. Tariff-reform Republicans joined hands with the reconstruction-reform men, but as tariff-reform men were comparatively few in most of the states where the insurgents hoped to gain a following, this issue was kept in the background. The passage of the Ku-Klux bill in 1871 was so actively opposed by Schurz and Trumbull as to cause these two leaders to draw together and to gather around them the more liberal elements in the party; and this group was further unified by the New York Custom House affair. Nevertheless, as late as in December of 1871 neither Trumbull nor Schurz had openly planned to oppose Grant's reelection.⁵

Early in January the movement, which as yet had appeared only as a division in Congress, began to take on a more popular aspect. In Missouri and in Southern Illinois, where the Southern element was strong, there was a great deal of fighting among the people in support of Schurz, Trumbull, and Sumner. The Missouri Liberal Republicans held a convention in January, and issued a call for a national mass convention in May. Preconvention speculation as to the presidential candidate of this seceding Republican gathering centered at that time about two men, Lyman Trumbull and Charles Francis Adams. The people of the southern third of Illinois, as well as many throughout the state who remembered Trumbull's service, were very hopeful concerning his chances. Governor Palmer and the influential Jesse K. Dubois were his leading supporters. Adams was probably better known in the nation than Trumbull, and had proved his ability in

⁵Horace White, *Life of Lyman Trumbull*, 269-271, quoting an interview published in the *Louisville Courier-Journal*, Dec. 3, 1871, and *New York Times*, Dec. 6. A letter from Trumbull to W. C. Flagg, among the *Flagg MSS*, dated Jan. 10, 1872, however, shows that at that date Trumbull was contemplating open opposition to Grant in the Republican party. Flagg was, according to his own statement, Trumbull's only confidant at this time.

the difficult position of minister to England during the Civil War.

Just when Trumbull's prospects were brightest, Judge David Davis decided that he would be a candidate for the nomination. Leonard Swett, the famous criminal lawyer, long an associate and close personal friend of Judge Davis, became his manager, and enlisted the services of Fell in arousing the people of McLean County and Central Illinois to the support of a citizen of their own community for the nomination. Fell, from the first an advocate of a milder reconstruction policy and for that reason thoroly in sympathy with the Liberals, had been a Trumbull adherent until Davis made his decision, when he changed to support an old and dear friend.⁶ By the first of April, then, he was being consulted as to the plans for the Davis campaign at Cincinnati. Swett, ingenious and indefatigable, estimated the strength of the Trumbull faction, and proposed that to counteract it a train load of Davis supporters should go to Cincinnati, that they might influence the nomination there as the Illinois delegations had in 1860. McLean, Tazewell, Livingston, Logan, DeWitt, Champaign, Ford, Iroquois and Vermillion counties were strongly in favor of Davis, and from these counties Swett drew the delegations upon which he mainly depended.⁷ Peoria County, and especially the German population (the strength of

⁶Fell to Lyman Trumbull, Mar. 4, Apr. 11, 1872. (*Trumbull MSS*, Library of Congress.) Trumbull to Fell, Mar. 9, 1872. Mr. Fell's sympathy for the once oppressed black man did not blind him to the shame of the existing oppression of white men in the South. A letter to James G. Blaine, written Mar. 3, 1885, but possibly never sent, shows plainly his ideas upon the subject, and contains some very entertaining comments. After referring to the failure of Republican reconstruction, he says: "Unfortunately the Democracy of this country neither learns nor forgets much, and without outside aid, I have slender hopes in that direction." He thinks reform must come through some liberal leader. "As possibly you may know, I was quite intimately acquainted with Abm. Lincoln, & in a feeble way did something in 1858, 9 and 60 in bringing him before the people as a presidential candidate. In the enclosed I have ventured to say what were some of his views touching the matter in hand—reconstruction. Had he lived doubtless they would have been modified. . . . Whilst you are not where many of us would have you, are you not in a position where you can be almost as influential? Your 2nd vol., in which you will discuss this very question, is yet to be published. Why not give this matter your *patient, very best thought?*"

⁷Swett to Fell, Apr. 1, 1872.

the Republican party there), would accept any man who might be nominated, in the opinion of Robert Ingersoll.⁸

Early in April a number of disaffected Republicans met at the home of Horace White in Chicago, and agreed to issue a call for the Cincinnati meeting, signed by as many influential men as might be induced to join the movement. As this followed the one already issued by Missouri (and was copied from the one issued in New York), it was called a "Response." It appeared first in the *Chicago Times*, April 17, 1872. Thirty-eight men, including Gustav K rner and Horace White, Dubois, Miner, Jayne, and Fell, signed the call as first published, and within a few days a longer list appeared, comprising the names of hundreds of Illinois Republicans.⁹ Palmer, at first inclined to favor the Regulars, decided in March to espouse the new cause, and declined the Regular Republican nomination for the governorship, which was accepted by Oglesby.¹⁰

Trumbull kept Fell informed of the trend of affairs in Washington, while Fell wrote him of the local situation.¹¹ Trumbull

⁸The letter from Robert Ingersoll to Mr. Fell, dated Peoria, Apr. 6, 1872, expresses with remarkable frankness that would-be statesman's resentment of his rejection by the people of Illinois. "You must not expect me to make a speech at Cincinnati," he says. "I am done. I can conceive of no circumstances under which I would make a political speech. If ever in this world a man was thoroughly sick of political speaking, I am that man. Understand me, I am an admirer and a friend of Judge Davis. I want to see him president of the United States and I believe he will be. And what little I do will be done for him. I am going to take no active part for anybody. For some reason, the leaders in politics are not my friends, and never have been. My only ambition is to get a living and to take good care of my family. The American people have lost the power to confer honor. . . . Leonard Swett wrote me upon the subject of going to Cincinnati. I wrote him that I was sick of politics. By the way, if his letter had been about one-tenth as long, it would have been infinitely better. His letter is good; but too much of it. All his points could have been made in one column. A letter never should be so long as to require an index."

⁹White to Fell, Apr. 10, 1872. Fell to Trumbull, Apr. 8. *Chicago Times*, Apr. 17, and *Pantagraph*, Apr. 19, 20.

¹⁰*Carlinville Democrat*, Apr. 17. *Pantagraph*, Apr. 18. On the 23d of April, Palmer delivered a very influential anti-Grant speech at Springfield, which served greatly to strengthen the forces of the Liberals.

¹¹Fell to Trumbull, Apr. 8, 11, 1872. (*Trumbull MSS*, Library of Congress.) Trumbull to Fell, Apr. 11, 16, 1872. Trumbull's letter of April 11 spoke of the Cooper Union meeting, at which Trumbull and

would give no formal consent to the use of his name before the convention until late in April, apparently with an unselfish desire not to hamper the success of the reform wave by introducing personal factions. Indeed, he tried to impose on other leaders an entirely impracticable policy of entire silence with regard to candidates until the meeting at Cincinnati.

Meantime the Davis group was vigorously pushing its candidate in the only region in which he could command much support; for, being a jurist and not a political leader, and being but little known throughout the country, his strongest claim to recognition lay in his having been the personal friend and appointee of Lincoln,—a claim that amounted to little except in Illinois. Since men with even less fame have succeeded in winning nominations from the lottery of convention chance, Swett and Fell had lively hopes that with a good delegation of local supporters they might carry the day in Cincinnati. The Democrats, strong in Illinois, were rallying to his support. Among these was Adlai Stevenson, a man of considerable influence and a neighbor of Judge Davis, who with his adherents formed part of the Davis party at the convention. Swett was a skilful manager, and by convention time had gained half the Illinois forces for Davis. The Labor Reform party had already nominated him for president in February.¹²

Returning from a tree-planting expedition to his Iowa lands just before the convention, Fell preceded by a few days the delegation which started from Bloomington at five o'clock on April 29. Judge Davis' generosity in providing facilities for the attendance of his supporters made the following a large one; contemporary accounts say it was also a very noisy and confident one. About 550 men from Bloomington and vicinity went to Cincinnati; the entire Illinois contingent numbered over a thousand.¹³

The Davis party, ensconcing itself early at headquarters and marshalling its forces in well-organized companies which gave a strong impression of confidence and success, seemed to lead all others before the convention opened.¹⁴ There was an under-

Schurz both spoke to an immense audience, and said that the movement had attained such proportions that no one faction could then control it.

¹²Stanwood, *History of the Presidency*, 336.

¹³*Pantagraph*, Apr. 10, 13, 17, 19, 27, 30, and later issues.

¹⁴"It is obvious that the Davis crowd is the calmest, the most confident, and the best organized and disciplined. They pitched their tents

standing—in which it is natural to suspect the old combination of Lewis and Fell—that Davis should have first place, and Governor Curtin of Pennsylvania second; an arrangement which Curtin's own ambition to head the ticket brought to naught. Adams, by far the most able and best prepared of all possible candidates, was unpopular in the West because of the very qualities which made his strength—his distinguished ancestry, his long and successful diplomatic service, his thoro education and statesmanlike qualities. His opponents reviled him as an "aristocrat;" to which his friends answered by inquiring with asperity if it were in the Constitution that the president had to come from Illinois?

The "hordes" from that state had but a fictitious strength, for they were divided into three factions, supporting Palmer, Trumbull and Davis respectively. On the twenty-ninth of April there was waged an all-day fight among the Illinois leaders, who could arrive at no kind of agreement. Swett and Fell found themselves pitted against White and Bryant, the capable Trumbull managers. On the thirtieth—Tuesday—the leaders decided to divide the Illinois vote among the three candidates. They called a meeting at three o'clock in Greenwood Hall. Dr. Jayne of Springfield, a Trumbull supporter, issued the call. Fell presided, and the secretary was a Palmer man. About a thousand

the earliest, and have worked up in detail all the strong points of their candidate and all the weak points of his rivals.

"It is claimed that Davis is the only man in the crowd who is personally popular. Adams is aristocratic, Brown belongs to the 'hurrah' school, but has few warm friends; Trumbull is cold as a fish; Cox is phlegmatic and Greeley is pudgy and eccentric. 'But Davis,' says Jesse Fell, 'is a man who is beloved by those who know him. I have known him personally and intimately for thirty years, as I knew Lincoln, and he is just such an honest, faithful, straightforward, incorruptible man; and he possesses the same personal magnetism. He would give us the same enthusiastic campaign and the same overwhelming victory. All of those who were old Abe's associates before 1860 are now asking Davis' nomination. He now lives in Central Illinois, and has made two million dollars in fair dealing, and he hasn't an enemy in all that region, nor in the world. The last two times he was elected Judge without a single dissenting vote from either party.['] This is the way his friends talk; and Fell is one of the sincerest of men, and his moderation gives weight to his words. Davis seems ahead at this hour. Curtin is to get the second place, in consideration of giving Pennsylvania's vote to Davis for the first."—*Chicago Post* of Apr. 28, quoted in *Pantagraph*.

Illinoisans attended the meeting, and came to an agreement concerning the division of the votes.¹⁵ There was a street procession for Davis after the meeting, and great enthusiasm. In the evening an adjourned meeting was addressed by Judge Wentworth and John Hickman, the latter from Pennsylvania.

In spite of all these well-laid plans Davis was foredoomed to failure, the leaders in the party being uncertain both of his ability to attract the popular vote and of his interest in the particular reforms they advocated.¹⁶ Starting with a vote of ninety-two and a half, he lost steadily, retaining only six in the final ballot. His supporters were scarcely less disappointed than was Schurz at the failure to nominate Adams or Trumbull, both men far more likely to carry the Liberal banner to victory. The "Gratz Brown trick" by which Greeley won the nomination in spite of his eccentricities, his extreme views, and the lack of confidence of his colleagues, seemed to stun the party leaders everywhere.

Governor Palmer was among the first to recover from the shock and to shape a definite program. Assuming that despite personal disappointment the Davis supporters would rally to the ticket, he wrote to Fell asking for a survey of the field in his county and estimates of Liberal strength, and asking his support for Greeley.¹⁷ Palmer was personally much attached to Greeley, who had befriended him in the *Tribune* the winter before, and was therefore the more willing to urge the disgruntled into self-forgetting efforts for the cause. A state convention was to be arranged for, and strong efforts would be necessary to popularize the erratic editor of the *Tribune*, against whom the Middle West still remembered his harsh criticisms of Lincoln. With Adlai Stevenson, leader of the Democrats, Fell arranged a mass-meeting to ratify the nomination. This was held on May 12. Fell

¹⁵Twenty-one were to go to Davis, eleven to Trumbull, and ten to Palmer. *Cincinnati Commercial*, May 1; *Chicago Times*, May 1; *Pantagraph*, May 2.

¹⁶Horace White attributes the failure of Davis to "the editorial fraternity, who, at a dinner at Murat Halstead's house, resolved that they would not support him if nominated, and caused that fact to be made known." *Lyman Trumbull*, 380-381. A letter from one of the McLean County delegates to the *Pantagraph* of May 3 says that "It is believed, and is doubtless true, that Belmont's visit here resulted in buying every Cincinnati paper as well as those of Louisville, to oppose Davis at all hazards." This letter is dated 1:30 p. m., Thursday.

¹⁷Palmer to Fell, May 8, 1872.

presented the ratification resolutions with a speech, which was followed by speeches by Adlai Stevenson, General Gridley, Major Sterlein (speaking for the Germans), Dr. Rogers, and others. A letter from Governor Palmer was read. By the end of the meeting, it is fair to assume that the leaders themselves were almost persuaded that they wanted Horace Greeley to be president.¹⁸

Horace White of the *Chicago Tribune*, staunch Trumbull man that he was, entered heartily into the Greeley campaign through loyalty to a cause which he did not feel justified in abandoning because of poor leadership. He wrote to Fell in late May to tell him that it had been agreed at the state convention (which Fell did not attend) that the Illinois member of the national executive committee was to be Jesse Fell. This appointment was declined, Mr. Fell doubtless feeling that he could not effectively serve a man of whose fitness for the presidency he was not sure.¹⁹

Nevertheless his personal relations with Greeley during the summer and autumn of 1872 continued to be friendly, and while in New York late in November, he was granted one of the last interviews which that sadly disappointed and broken man could have given to any of his friends.²⁰ Fell himself gradually withdrew from active participation in politics after the Cincinnati meeting, feeling that the day of his service in that field was past.

¹⁸*Pantagraph*, May 7, 1872, for Fell's declaration in favor of Greeley; May 9, call for a ratification meeting; May 13, account of the meeting.

¹⁹White to Fell, May 28, 1872.

²⁰Greeley to Fell, Nov. 23, 1872. The note, in Greeley's altogether inimitable scrawl, is very characteristic:

Dear Sir:

Call at the Tribune office at 4 P. M. (Sunday,) second floor on the south side. Knock and it shall be opened.

Yours,

Horace Greeley.

Mr. Fell, of Illinois, Astor House, city.

CHAPTER XI

THE TREE-PLANTER

It was J. A. Sewall who, when the etherialized earthiness of Elizabeth Stuart Phelps' *Gates Ajar* had set every-one to discussing his idea of heaven, replied to a young woman who had asked him if he thought there were trees in heaven: "I really don't know, but if Jesse Fell gets there and finds none, he will hunt around and find some somewhere and plant them."¹

The remark shows the extent to which Mr. Fell and tree-planting were associated in the minds of those who knew him. It was his great passion, perhaps more than anything else his life-work, to set trees in the bare prairie and watch them make of it a garden. From his first months in the new land, when the bleakness of its prairie struck his eyes with especial force, used as they were to the rolling wooded stretches of Pennsylvania and Ohio, he looked forward to the planting of trees. That there were no trees except along the streams was, to him, the one disadvantage of the prairie.² Therefore he planted trees in the towns in which he owned land. He lined the streets of Lexington, Clinton, Pontiac, and other places with rows of maples and elms. Wherever he held a block of lots, there clumps or rows of trees marked the land that Fell owned.

But at no other place did Mr. Fell plant trees with quite the loving enthusiasm which he gave to that work in Bloomington and Normal. In the summer of 1856, when visiting in West Philadelphia and Germantown, he was especially impressed with the beauty of the streets there. Germantown was shaded by stately old trees, but West Philadelphia was a new town, already beautified by careful and extensive planting. Vowing that he would make his own town in Illinois as lovely as West Phil-

¹J. A. Sewall to Fannie Fell, March 15, 1909.

²Fell to his parents, Nov. 17, 1833. The settlements were built in the edges of the groves, he says, in some places extending two miles into the plain. "As the settlements move out into the prairie, people will turn their attention to the cultivation of the forest trees. This in some neighborhoods has already been done." A. W. Kellogg in *Pontiac Sentinel*, Aug. 29, 1889.

adelphia, Fell planned a comprehensive planting campaign, which he began to put into effect the next year.³

His first move was to secure a special act from the legislature to permit the fencing of young trees planted in open streets, for their temporary protection.⁴ His desire was to plant double rows along all the streets, with something like the spacious prodigality of Hadley, Massachusetts. But North Bloomington streets were not surveyed upon so generous a scale, and so only a few streets could have double rows. Even so, twelve thousand trees were set out in Normal before a single house was erected.⁵ The stimulus and example so given, together with the ease of acquisition afforded by the nurseries, made planting a fashion. People vied with each other in making their private grounds beautiful. They quoted Mr. Fell's version of an old couplet—

"He who plants a tree (*and cares for it*)
Does something for posterity,"

and acted upon its suggestion. Bloomington had already become known as the "Evergreen City," and Normal came to share in the name. But evergreens do not attain a permanent growth in prairie soil, and of late years the greater part of the conifers so enthusiastically planted by that generation, have given way to the more adaptable maples and elms.⁶

Many of the trees planted were from Mr. Fell's own nurseries. Unsold lots were utilized as branch nurseries, and the noble Fell Park, with its groves, lawns, drives and gardens, set an example of beauty and gave Normal a place of recreation. Mr. Fell personally supervised all planting, and it is due to his great and loving care that of the trees suited to Illinois conditions, scarcely one has died in the half century since their planting. The original twelve thousand trees were increased to thirty-five thousand before many years. It is to be noted that long before the transplanting of large trees became a common feat, Fell invented a variety of huge cart which could be used for this pur-

³Lewis, who tells this anecdote of Mr. Fell (*Life*, 54), was with him during the drive through West Philadelphia when this resolution took form.

⁴*Laws of Illinois*, 1857, I, 509. Approved Feb. 13, 1857.

⁵*Pantagraph*, May 27, 1857; July 26, 1865. Raymond Buchan in *Pantagraph*, Mar. 16, 1898.

⁶Henry Shaw, "Evergreens," in *Pantagraph*, July 19, 1854.

pose, and full-grown trees were transplanted in Normal to beautify the homes of those who wanted results quickly.⁷

From the first, Mr. Fell assumed the responsibility of looking after the grounds of the Normal School. He wanted to have planted upon its campus every tree that would flourish in Central Illinois, that the studies of botany and forestry might be pursued there to advantage. He insisted, at a time when expert advice upon æsthetic matters was not highly valued, that the grounds should be planned by a professional landscape gardener, and secured the services of William Saunders of Philadelphia, who had planned his own grounds at Fell Park, for this purpose.⁸

The rather elaborate plans of Saunders were not carried out by the board of education during the first hard years, when the school was struggling for life. Year after year passed indeed, and the campus remained almost as bare as in the beginning. Finally, to secure the realization of his hopes and plans, Mr. Fell became a member of the board of education in 1866, continuing until 1872. He secured, with the coöperation of interested friends, the passage of a law which went into effect February 28, 1867, relative to the planting of the campus.⁹ This act included an appropriation of three thousand dollars, and with the prospect of this cash assistance he set to work. The entire campus was subsoiled and plowed during the spring and summer of 1867. Before his official work had begun, Mr. Fell had planted some trees upon the grounds; in 1868 he set out 1740, and 107 more the next year. Saunders' plan was followed as closely as circumstances permitted. In 1870, patches of oats and potatoes yielded a small income for use in defraying the expense of this planting. Even with this help, the appropriation was insufficient, and the work had to be completed at Fell's own expense. Having finished as nearly as was then possible the work which he regarded as peculiarly his own, he resigned from the board.

⁷Lewis, *Life*, 55. Raymond Buchan, of Osman, Illinois, set out most of the trees under Fell's direction. "He was the best man I ever knew," said Buchan of him. *Pantagraph*, May 27, 1857. John Dodge, "Concerning Jesse W. Fell," in *Fell Memorial*.

⁸Saunders to Fell, Oct. 15 and 29, 1858. Saunders advised that a nursery be started upon the grounds, a plan which was carried out in a small way. The planting plans (for which Saunders charged \$65) are among the Fell papers.

⁹*Public Laws of Illinois*, 1867, 21.

In 1885 he became interested in the efforts of Dr. Stennett of the Northwestern Railroad to induce railroad companies to plant trees for ties. The more scientific control of the supply of wood for railroads had been, years before, a hobby of his own.¹⁰ Mr. M. G. Kerr of St. Louis, also interested in the project, asked him to write for the forthcoming report of the bureau of forestry, which Kerr hoped to make of commercial value. So far as known, this article was never written, probably on account of the condition of Mr. Fell's health.¹¹

His interest in trees led to his friendship with Henry Shaw of St. Louis. For Jesse Fell alone, it was said, would this rigid Presbyterian Puritan open his famous garden on the Sabbath. Then the two men would walk around together, admiring new or particularly fine specimens, and discussing varieties and culture. Sometimes Mr. Fell took his son Henry with him on these week-end trips to St. Louis.¹²

Mr. Fell's last extensive venture in real estate was so essentially a tree-planting enterprise that it may best be related here. In 1869 a number of Bloomington men became interested in Iowa lands. As the representative of this group of men, Mr. Fell went to Iowa that summer, and selected a tract of about forty sections—more than twenty-five thousand acres—in Lyon County in the northwestern corner of the state. Even in its unimproved state this section of the country was exceedingly attractive. "In thirty-two of the thirty-seven states comprising our union," said Mr. Fell in describing it, "I have never beheld so large a body of surpassingly beautiful prairie as is here to be found. There is absolutely no waste land, and scarce a quarter-section not affording an admirable building-site."

The plan of the proprietors was to survey a town in the center of their holdings, and to start the work of improvement on each farm by breaking a few acres of land, and by planting trees and willow hedge.¹³ The town was named Larchwood, and the

¹⁰O. H. Lee to Fell, July 4, 1853.

¹¹M. G. Kerr to Fell, Sept. 22, 1885. The letter is accompanied by "A Circular addressed to presidents of Railways, with the request that you may express to me your views and experience on the uphill road of interesting Railroad men in matters of Forest Culture," a set of "Inquiries addressed to Railway Managers," and a circular from the Department of Agriculture.

¹²Henry Fell, interview, May 31, 1913.

¹³Lewis, *Life*, 104. The original company included, besides Mr. Fell, Charles W. Holder, John Magoun, R. E. Williams, A. Burr, E. H. Rood,

settlement came to be known as the Larchwood Colony. For many years Mr. Fell devoted much time each spring and fall to personal supervision of the improvements there. As in Normal and other places in Illinois, he did not trust the work to employees, but superintended the setting of the trees himself, sometimes helping with the actual labor. The improvements accomplished were unusual. In May, 1873, Fell set out a hundred thousand trees and cuttings, distributed through eight sections of land. At that time a hundred fifty thousand trees had already been set out, and a tract of forty acres in the center of a number of sections insured a "start" of ten acres of broken ground to every immigrant who bought a quarter-section. Larchwood farms at that time were selling at from four to six dollars the acre.¹⁴

The history of Larchwood serves to illustrate one of Jesse Fell's notable characteristics. General Gridley, who knew him well, was wont to say of him that he was never mistaken in his estimate of the ultimate value of a piece of land, but that his eager nature greatly discounted the length of time which would elapse before that value was realized. Imaginative and enthusiastic, full of faith in the development of the West, he calculated upon an increase in value far more rapid than the actual rate of settlement justified. What he thought would be an accomplished fact in ten years, the slow moving forces of development realized, perhaps, after thirty or forty. Larchwood, with its unusual advantages, did not grow as its promoters hoped it would, and about 1880 the Illinois owners decided to sell what was left of the tract.¹⁵ An Englishman, Richard Sykes, who dealt exten-

Richard Edwards, Milner Brown, and Daniel Brown. The willow hedge was planted because it would grow quickly, and later furnish fuel. Fell, *To Hon. George D. Perkins, Commissioner of Immigration for the State of Iowa*, June 27, 1880. (A printed letter.)

¹⁴An account of a settler appeared in the *Pantagraph*, Apr. 12, 1872. One by a settler in a neighboring vicinity, *ibid.*, Apr. 25, 1872.

¹⁵At that time, there were about fifty miles of willow hedge outlining the farms, and many of the trees were from twenty to thirty feet high. White willow, box elder, white maple, white ash, cottonwood, basswood, black walnut, honey locust, chestnut, European and American larch, white and Scotch pines, osage orange, arbor vitæ, Norway and native spruces, were among the trees and shrubs then growing. The *catalpa speciosa*, Mr. Fell's favorite protégé, was a feature of the village planting. See Dr. John A. Warder, *American Journal of Forestry* for Oct., 1882. (Also reprinted as a circular.)

Captain Henry Augustine, long a prominent nurseryman of Normal,

sively in American lands, purchased the Larchwood farms, and came to America with his brother and a party of friends in April, 1882, to see the estate that he had acquired.¹⁶ He had previously brought out a pamphlet concerning Larchwood, and after inspecting the farms took up the work of further development with enthusiasm. He sent George E. Brown, an experienced forester from Scotland, to take charge of the groves, and sent saplings for planting. Delighted to find a successor so in sympathy with his ideas, Fell long kept up friendly relations with Mr. Sykes and various Larchwood residents.¹⁷

has told of his first meeting with Mr. Fell and of his championing of the *Speciosa*. A shy, awkward German boy, seeking his fortune in the new country, Mr. Fell called him in from the road one day, and had a long talk with him in his office. Finding that he loved trees, Mr. Fell explained to him the difference between the worthless and harmful varieties of the catalpa, and the useful *Speciosa*. He showed him the slight difference in the seed which is the only distinguishing mark in appearance. Mr. Augustine in later years himself became an extensive grower and dealer in the *Speciosa*. Henry Augustine, interviews. Fell in the *Pantagraph*, Dec. 30, 1882.

¹⁶The sale took place in 1881. Sykes to Fell, Nov. 26, 1881; March 10, 19, 1882; March 10, 1884; Aug. 4, 1886. Close Brothers to Fell, Jan. 26, 1882. Newspaper clipping of Jan. 19, 1881, in *Scrap Book*.

¹⁷As late as 1886, Fell was still corresponding concerning titles to Larchwood property. Sykes to Fell, Aug. 4, 1886.

CHAPTER XII

THE LAST YEARS

His unsuccessful efforts for David Davis were, as has been said, Fell's last important active participation in politics. After that, altho still interested in the issues of the day, he did no campaigning, save for some local projects in which he was interested. He continued to correspond with men who were in the field, and occasionally, upon request, expressed his opinions in the press.¹ Logan, engaged in 1874 with the formulation and passage of the Resumption Act, wrote to him upon finance; Wentworth and Murray discussed the election of 1876 with him.² As the faithful friend of Judge Davis, he seems to have arranged for his election to the Senate in 1877. He induced Palmer, the incumbent at that time, to withdraw from the race, and to throw the weight of his influence to the side of Davis. Logan was defeated, and Cullom became governor of Illinois.³ Any injustice still called forth a spirited defense of the person wronged, as in the case of S. W. Moulton, who was accused by political enemies of having had secession sympathies; and in the campaign against severe corporal punishment at the Soldiers' Orphans' Home, waged in 1877.⁴ With his brother Kersey, he induced William

¹Note, for example, the undated newspaper clipping, quoting a letter of Fell's dated Sept. 20, 1880, at Larchwood, giving reasons for supporting Garfield.

²Logan to Fell, Feb. 16, 1874; Jan. 11, 1875. Wentworth to Fell, July 3, 1876. Bronson Murray to Fell, Dec. 18, 1876.

³Fell to Palmer, Jan. 15, 1877. Endorsement by Fell. Later, Fell was active in a movement for erecting a bust to Judge Davis. H. C. Whitney to Fell, Jan. 23, 1887.

⁴Moulton to Fell, Jan. 9, 1884. Davis to Fell, Feb. 4, 1882; Jan. 22, 1885. Oglesby to Fell, Mar. 17, 1884; Sept. 18, 1886. J. B. Foraker to Fell, Jan. 26, 1887. This last letter is in reference to an abortive attempt to secure the nomination of Robert T. Lincoln for president in 1888. *Pantagraph*, Jan. 4, 1884. Fell, "Oglesby and Logan," in *Chicago Tribune*, Jan. 13, 1879. *Bloomington Leader*, July 23, 1877.

A. Allin and David Davis to give Franklin Park to the city of Bloomington.⁵

Business was not by any means given up. Altho he had always made money easily, he had lost as well, and had given much away. He was no hoarder; money in itself was nothing to him.⁶ Withdrawing from the larger enterprises of his prime, in his old age Mr. Fell bent his energies toward securing property which might be depended upon to yield an income to his family after his death. Some land he owned in the outskirts of Normal was planted to strawberries and larger fruit, and from this he derived an incalculable amount of pleasure and a satisfactory return in money. Fell Park was sold to a syndicate, which after his death divided it up into city lots. Its great beauty became but a memory to the people of Normal, altho some of the fine trees still shade that part of the town.⁷

He kept in close touch with friends, among whom Jonathan Turner, Richard Edwards, Lawrence Weldon, John H. Bryant, and Charles G. Ames were perhaps nearest to him.⁸ His grandchildren, who lived very close to his home, were a source of great pleasure to him, and he took the keenest interest in their education. When not in school, these children were usually at their grandfather's, "keeping store" in the playhouse he had built years before for his own children, or listening to him as he sang to them or told them stories, working as he did so among his trees and shrubs. They took long drives with him into the country, and planned with him wonderful things to do in the future; for when he was an old man, Jesse Fell retained that fresh and buoyant forward-looking which had made him strong to accomplish in his youth, and passed it on to those who had their lives still before them. And with these family ties he kept up, later than any secular activity, his church work and church attendance. A new movement to which he gave some

⁵Franklin Price in *Pantagraph*, May 10, 1900, and *Normal Advocate*, Apr. 21, 1894.

⁶He told Eberhart once that he liked to make it, and enjoyed spending it for the benefit of other people, many of whom didn't know how to take care of themselves. The remark shows his somewhat paternal attitude toward society, and explains many of his projects.

⁷*Pantagraph*, Mar. 18, 25, 1888. Thomas Slade in *Bloomington Leader*, Mar. 2, 1877. *Bloomington Eye*, Mar. 25, 1888.

⁸Turner to Fell, Jan. 1, 1879. Bryant to Fell, Feb. 25, 1885. Ames to Fell, Mar. 20, 1883.

time and attention and his unqualified assent, was that of woman suffrage, then in the days of its greatest struggle for a hearing. When Susan B. Anthony debated with President Hewitt of the normal school, it was he who introduced the pioneer suffrage advocate, and in his home she was entertained.⁹

Some time was spent in travel. In 1872 he made his first trip to the Pacific coast.¹⁰ In 1873 he paid a visit to his old home in Pennsylvania, and treasured until his death the memory of drinking water again at the spring in the milk-house, sitting by the fire-side, and having tea with the hospitable people who had bought his father's old farm. He spent the night with R. Henry Carter, as he had the last night before starting for the West in 1828. In later years he took, with various members of his family, trips through the farther West, which seemed to him a wonderful new world. He was planning a winter in California when overtaken by his last illness.¹¹

In ripening years a keen sense of humor, which during his more strenuous days was either subordinated to more important things, or forgotten by others in the memory of accomplishment, found frequent expression. It crept into conversation, brightened letters, even led to gentle Quaker jokes. These he could take as well as give, as two newspaper notices, quoted by Mr. Lewis, prove.¹² The first appeared on January 28, 1874, and read—"J. W. Fell mourns the loss of an umbrella, left in the court room yesterday. He would be pleased if the finder would leave it at the *Pantagraph* office." The sequel came the next day: "J. W. Fell desires to return thanks for the generous supply of umbrellas left for him at the *Pantagraph* office yesterday in answer to his advertisement of one lost. Altho most of these offerings are better adapted to dry weather than wet, Mr. Fell is not disposed to look a gift horse in the mouth, but accepts the varied assortment with the feeling that it is pleasant to be remembered in the hour of one's distress."

⁹Fell to Sarah E. Raymond (Mrs. S. R. Fitzwilliam), Nov. 22, 1886.

¹⁰Leonard Swett to Thomas A. Scott, Sept. 6, 1872.

¹¹Newspaper clipping in the *Scrap Book*, Sept. 8, 1884. *Bloomington Leader*, Feb. 18, 1887.

¹²Lewis, *Life*, 104.

It was a few years later that a young girl invited him to a dance. The reply was as follows:¹³

Miss Florence Richardson:

The fair invites! and so, you bet,
Your invitation I'll accept.
But I must tell you in advance
My Quaker foot it will not dance.
A thousand times I have lamented
That Fox and Penn were so demented
As to proscribe what all can see
With half an eye, is poetry;
If not in words, in what is better,—
In motion, life, spirit, letter.
Yes, if I could, I'd skip and prance
In all the ecstasy of dance;
For I am young, and supple too,
I'm not quite three-score ten and two.
But what's the use? My education's
So neglected I'd scare the nation!
So goodbye dance, it's not for me,
As you and all can plainly see.

But, what of that? I shall propose
To play a game of dominoes;
And if perchance you're so inclined
Will play a game of mind with mind,
Holding to each other's view
The things of life, both old and new;
The ups and downs, the weals and woes
That follow man, where'er he goes.

Meet at the hotel? Very well,
There you'll find Yours,

J. W. Fell.

These instances will suffice to show the quality of the humor in which he met the days of declining strength. His last years were happy as they were busy. "I was glad to know," wrote John H. Bryant to him in 1885, "that you had got beyond all fears of the future, that terrible burden that weighs down with gloom, misery, and wretched forebodings so many of our race, and especially innocent children who are reared under orthodox instruction."¹⁴

In the winter of 1885-86 he suffered a severe illness, beginning with an attack of pneumonia in December, from which his

¹³Jan. 24, 1880. Newspaper clipping in *Scrap Book*, and manuscript.
Normal, Jan., 1880.

¹⁴Bryant to Fell, Feb. 25, 1885.

convalescence was very slow. At times his family despaired of his recovery. He did rally, however, and grew stronger during the summer, so that people hoped he might be spared for several years. But when cold weather came again, there was a relapse. He became really ill in January, but refused to stay closely at home. In February he spent two days in Chicago, attending to business for the Normal School which urgently demanded attention. He returned to his home in a very serious condition, made worse perhaps by worry over school affairs, then at a most critical juncture. The family physician, in consultation with others, pronounced it a case of anæmia of the brain. For a week he lay in a comatose sleep. Rousing himself finally, he spoke to members of the family, repeated Pope's "Universal Prayer", a favorite poem, and the "Now I Lay me" which he had said since boyhood. His death occurred on February 25, 1887.¹⁵

The usual marks of respect and regret at the death of a prominent and beloved citizen were paid him. Telegrams, letters, and flowers were sent from far and near. Newspapers printed eulogies and reviewed his life and work. Town councils, the Bloomington Bar Association, churches, schools, passed resolutions of respect.¹⁶ The funeral, on the twenty-eighth of February, was held in the large assembly hall of the Normal School; no church could have held the crowds that attended. The public schools were closed. Business in Normal was suspended.¹⁷ Special cars were run from Bloomington to Normal, to accommodate the people who wished to pay the last honors to Jesse Fell. The aisles, corridors, and stairs, and the steps of the building were filled with silent mourners who could not find room in the hall. Rev. Richard Edwards, his old friend and neighbor, preached the funeral sermon. Mr. Fell had selected him for this duty, pledging him to the briefest possible account of his accomplishment, a pledge which Dr. Edwards kept at the cost of some criticism from those who did not understand the circumstances.

¹⁵*Chicago Tribune*, Feb. 26, 1887. *Pantagraph*, Mar. 7, 15, 19, 1887. Richard Edwards to Fell, Feb. 4, 1887.

¹⁶A lodge of Knights of Pythias, shortly after organized in Bloomington, was named for him, altho he himself was never a member of any such organization.

¹⁷*Bloomington Leader*, Feb. 26, 1887. *California (Missouri) Democrat*, Mar. 3, 1887, quoting from *St. Louis Republican* of Feb. 26, 1887.

The service over, the procession formed for the long drive to the cemetery at Bloomington. No tribute could have been more eloquent than the appearance of the funeral procession. The country roads were as bad as Illinois country roads can be in spring, but carriages, carts and heavy farm wagons had come in from all the surrounding country. Shabby and smart vehicles alternated in the line that followed the hearse; and the procession was so long that when the last mourners were leaving the Normal School, the first ones had reached the court house in Bloomington. The Bloomington school children joined those of Normal at this point.¹⁸

There was sincere mourning, for in death men pay eager tribute to qualities which are accepted without appreciation, or quite ignored, in life. Mr. Fell had not been unappreciated in life. He had won from men the only thing he asked of them, a trust and goodwill answering to that he bore them. It is doubtful if those among whom he lived had any adequate idea of the part he had played in public affairs for many years, and few of them understood the magnitude of the work of development which he, and others like him, accomplished for the Middle West. But those personal qualities which distinguished him among men, all men saw and honored. "It is a good thing," said Judge James Ewing of him, in voicing this appreciation, "to have known one man whose life was without spot or blemish; against whose honor no man ever spoke; who had no skeleton in his closet; whose life was open as the day and whose death comes to a whole community as a personal sorrow." And John W. Cook, who knew him well, said of him at the memorial service held in his own church on the sixth of March:¹⁹

"In that picture gallery of the soul that we call memory, there will always be a gracious presence. The personality is vivid; the outlines are sharply defined; the face is full of earnest purpose; every line is suggestive of tireless energy and the radiance of hope. A simple, honest, unostentatious man; yet wherever he has gone good deeds have marked his footsteps. As if by magic, stately trees have sprung from the path over which

¹⁸The telephone was then just coming into use, and the one connecting the court house with the Normal School was used on this occasion by Henry Augustine, who had charge of arrangements, and who related the details given to the writer.

¹⁹James S. Ewing in the *Fell Memorial*. *Pantagraph*, Mar. 7, 1887; Mar. 27, 1890; June 20, 1892.

he has walked. In their gracious shade generations yet unborn shall mention his name with gratitude. Institutions whose only aim is helpfulness to man record his generosity and public spirit."

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Land Tenure in the United States
With Special Reference to Illinois

CHARLES LESLIE STEWART

PREFACE

This thesis is based largely upon United States census statistics, the reliability of which is seldom questioned.

Illinois is a suitable state in which to make a type study of land tenure. Its value for such a study arises from: (1) its size and importance in the production of grain; (2) the variety of conditions in its agricultural economy; (3) its location in the great farming region of the Mississippi valley; (4) the ease of access its farmers have to large local markets as well as to other domestic and to foreign markets; and (5) the fact that, agriculturally, Illinois is neither an old nor a new state. Fortunately, the tenure statistics began to be collected at the time when nearly all of the present farm area had just been put under cultivation.

It was planned to carry on more field investigations than circumstances have permitted. There is need for cost accounting studies in the relative profitableness of various forms of tenure. The need for a thorough investigation of the relation of tenure to co-operative enterprise, roads, schools, churches, and social life is equally pressing.

The writer has received help from many colleagues in the faculty of the University of Illinois, especially from members of the economic seminar, and particularly from Professor David Kinley, director of the seminar and dean of the graduate school.

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CHAPTER I

A SKETCH OF LAND TENURE IN THE UNITED STATES

From the earliest date of colonization the land in the territory of the United States has been held under a system of tenure distinguished for its simplicity. The feudal tenure of Europe never obtained much footing in the United States and was influential chiefly in that Americans reacted against it.¹ In place of a complicated system of legal fictions and customary relations and charges, the land system of the United States may be said to consist simply of two forms: ownership; and tenancy, whether on a cash, share, or combined basis. The ownership is that which is known technically as allodial, that is, ownership in fee simple, free from any requirement of rent or service and from any other restriction except that reserved by the state in its right to tax, to exercise police power, and to force sales by virtue of the power of eminent domain.

Between the years 1782 and 1790, six of the seven confederated states which had claims to lands west of the Appalachian mountains had their cessions accepted by congress.² This laid upon Congress the responsibility of disposing of the Western lands. Congress in 1785 and 1787 passed resolutions which established the foundations of the national land policy. The principles laid down were that the land should be alienated by the government to settlers; that non-resident land owners should not be taxed higher than resident land owners; that the New England rectangular system should be employed; that the lands should be surveyed prior to settlement, and sold in small minimum parcels at low prices; that registry should be cheap, and conveyance simple; that the property of persons dying intestate should be equally distributed among the children. These provisions, together with the abundance of the lands, have

¹See article by Taylor, H. C., in *Cyclopedia of American Agriculture*, IV, 174-175.

²New York, 1782; Virginia, 1784; Massachusetts, 1785; Connecticut, 1786, and North Carolina, 1790. The offer of Georgia was made and rejected in 1788 and a satisfactory agreement was not reached until 1802. See Treat, P. J., *The National Land System*, 1785-1820, 15.

exercised a most democratic influence upon the agricultural, social and political life of the nation.³

The public domain of the United States grew by conquest and purchase at a most phenomenal rate. To the quarter of a million acres ceded by the states prior to 1803 there was added to the public domain in that year over three quarters of a million acres. Acquisitions in Florida and in the Southwest increased the public domain by a half billion acres, and the Alaskan purchase brought the total land acreage owned by the United States government to nearly two billion.⁴

These lands were disposed of at a rate sometimes appalling.⁵ During the period, 1831 to 1840, the annual acreage sold exceeded six million on the average. During the next forty years the land sold averaged two-thirds that amount annually. From 1881 to 1888 over twelve million acres left the hands of the government in an average year.

From 1888 to 1900, the annual amount of land taken up underwent a rapid decline, however, and since 1900 very little of the public domain has been sold or given away.

Under such conditions there is little wonder that during the earlier days the major part of the population devoted itself to agriculture. The census enumerations show that in 1820, 83.0, and in 1840, 77.5 percent of the "occupied" population was engaged in agriculture.⁶

Not only did agriculture employ the energy of the larger part of the American people up to the middle of the last century, but the greater part of the free farm families was undoubtedly in full ownership of their farms and homes. The land was taken up, in most cases, in tracts of a size suitable for almost every one to own a farm, and the owners were usually in such an economic condition that they needed the full return from their land instead of the small fraction which they could receive as rental incomes. Furthermore, urban life had not developed to a point where land owners were induced on any great scale to leave their farms so as to reside in the cities. Under such conditions, even though farm rents were low, tenancy had only a small place in American agriculture.

The path to land ownership needed at most to have no more than three stages, that of farm laborer, followed by a period of

³*Ibid.*, ch. II.

⁴Sato, Shosuke: *History of the Land Question in the United States*, 6.

⁵Taylor, H. C. *Syllabus of Lectures on Agricultural Economics*, 78.

⁶Census, 1900, Occupations, xxx.

operating leased land, and ending in the ownership of one or more farms. The passage from a propertyless to a propertied condition was one almost certain in its possibility of accomplishment by any able-bodied, industrious individual. In many cases, the laborer entered land directly without having to pass through the tenant status. Where tenancy was resorted to as a step to land ownership, it was a status from which the individual could usually rise in a few years.

THE TREND OF TENURE, 1850 TO 1880

Whether tenancy was becoming more or less prevalent during the generation before 1880 is a question. The estimates and opinions on tenancy before 1880 are hard to free from the prejudice prevailing when they were expressed.

Possibly the most definite opinions offered on the trend of tenure in the United States before 1880 are those of Dr. L. G. Powers who supplied some statistics on land tenure for the period, 1850 to 1870.⁷ Dr. Powers also gave some statistical estimates for the year, 1880, which bear some relation to the tenure statistics of the census of that date. The estimates he gave are as follows:

STATISTICAL ESTIMATES OF LAND TENURE IN THE UNITED STATES, 1850-1880,
AFTER L. G. POWERS.⁸

Year	1850	1860	1870	1880
Total farm families	2,458,000	3,358,750	4,082,700	4,935,000
Farm owning families.....	1,325,000	1,850,000	2,220,000	3,068,000
Families of tenants, laborers and slaves.....	1,133,000 ⁹	1,508,750	1,862,000	1,867,000
Families of slaves.....	461,500 ⁹	595,000	.....	.....
Families of tenants and laborers	672,500 ⁹	913,750	1,862,000	1,867,000
Families of tenants.....	.....	.....	.....	1,325,000 ¹⁰
Families of laborers.....	.....	.....	.....	542,000

From these estimates it appears that the increase in the number of farm owning families was over twice as great as the increase in the number of families of tenants and laborers, (including slaves in 1850). The percentage of farm families

⁷*The American Statistical Association Publications*, Vol. V, 329-344.

⁸*American Statistical Association Publications*, V, 344

⁹An error of 1000 was made in these figures.

¹⁰This is 300,000 in excess of the number of tenant farms as reported by the Tenth census.

owning their farms increased, according to the view of Dr. Powers, from 53.9 in 1850, to 62.2 in 1880.

The estimate that only 53.9 per cent of the farm families owned their farms in 1850 is probably an under-statement of the extent to which ownership prevailed at that time. It is probable that a larger proportion of the farmers owned their places in 1850 than in 1880. Several facts support this view. In 1850 the cotton lands were operated largely by the owners, of whom those who were too poor to own slaves were too poor to live without cultivating their own land, and those who had slaves seldom leased the land to others to operate. Outside of the cotton belt, land was being taken up in the North and West at a rapid rate, particularly during the sixties. Those who took up new land during this thirty-year period were to some extent former tenants, and by changing to owners must have tended to reduce the percentage of tenancy. Since the area of recently occupied land was being rapidly extended in the West, the influence of that section must have been more strongly against tenancy in the seventies than in the fifties. There seems, certainly, to be no evidence that the trend of conditions between 1850 and 1880 was enough different from the trend since 1880 to cause a movement toward ownership before 1880 and toward tenancy after that date.

Those who assume that the prevalence of large farms is conducive to tenant operation may argue that the decline in the size of farms during this period is an evidence of growth in popular ownership of the land. The large farms of this period, however, were chiefly in the newer country where land ownership was easy to acquire. In the older parts of the country, in spite of the increasing use of machinery, the farms were becoming smaller in all except the Southern states. The tendency to subdivide the older farms probably stayed somewhat the trend toward tenant farming, though it would be hazardous to say that it overcame that tendency.

Between 1850 and 1880, it is probable that the tendency in the South was towards tenancy, in the West towards ownership, and in the North and East, towards tenancy. In the country as a whole the trend towards tenancy was getting under way.

THE TREND OF TENURE, 1880 TO 1910

Beginning with the tenth census, 1880, we have reliable statistics on tenancy for every county in the United States. Data

have been taken with the farm¹¹ as the basis for each decennial enumeration since that date. At the eleventh census special data were gathered on farm and home ownership. In the twelfth and thirteenth census reports tenure statistics were also presented on the basis of acreage of land in farms.

When the results of the tenth census were published considerable surprise was evinced at the extent to which the farms of the United States were operated by tenants. Since that time, however, tenancy has become more and more prevalent in the country.

All of the elements of the farm population showed an increase in number in 1910 as compared with 1880.¹² The percentage of increase in the number of farms was 60; in the number of all persons engaged in agriculture, 40; in the number of owners, part owners,¹³ and managers, 35; of farm employees—persons other than owners, part owners, tenants and managers,—20;¹⁴ and of tenants, 130.

The table on the next page summarizes the census data on the tenure of farms for the main geographic divisions.

Taking the country as a whole the percentage of farms operated by tenants increased from 25.6 in 1880 to 37.0 in 1910. The decade during which the major part of the increase took place was the one from 1890 to 1900. Every division of the country outside of New England showed an increase in the percentage of farms operated by tenants. In the North Central group the percentage rose from a little over 20 in 1880 to

¹¹"A 'farm' for census purposes is all the land which is directly farmed by one person managing and conducting agricultural operations, either by his own labor alone or with the assistance of members of his household or hired employees." "When a landowner has one or more renters, croppers, or managers, the land operated by each is considered a 'farm'."

¹²Census, 1910, V, 122, adapted.

¹³A part owner owns some of the land he operates, and rents additional land.

¹⁴The relative decrease in prominence of the farm employees, is probably due to the increased efficiency of all farm workers. The total acreage per male in agriculture increased from 65.5 in 1880 to 71.0 in 1910, an increase of 8.4 per cent. (Census, 1900, V, xviii, and 1910, V, 28.) The improved acreage per individual in agriculture was 38.7 in 1910 as compared with 34.8 in 1880, an increase of 10.0 per cent. The cause of this increase is to be found mainly in agricultural machinery, the use and labor-saving efficiency of which has undergone a considerable increase during the period since 1880.

somewhat less than 30 in 1910; in the South Central states, from about 36 in 1880 to a little over 50 in 1910; and in the South Atlantic group from 36 to nearly 46 in 1910.

The old New England districts and the new Western regions were characterized by small percentages of tenancy, the former chiefly because of the agricultural depression which drove tenant farmers to other sections, and the latter largely on account of the chance for farmers to become landowners there.

A comparison of the percentages assigned to the various geographic divisions reveals a wider spread or range each succeeding decade. The percentage of tenant farms has moved higher most markedly where it was highest previously, and has shown least positiveness in increasing where it was already low. Taken as a whole, the increase in prevalence of tenant farming has been persistent, although not very rapid.

PERCENTAGE OF FARMS OPERATED UNDER VARIOUS FORMS OF TENURE,
UNITED STATES, 1880-1910.¹⁵

	United States	New England	Middle Atlantic	East North Central	West North Central	South Atlantic	East South Central	West South Central	Mountain	Pacific
Tenants										
1910	37.0	8.0	22.3	27.0	30.9	45.9	50.7	52.8	10.7	17.2
1900	35.3	9.4	25.3	26.3	29.6	44.2	48.1	49.1	12.2	19.7
1890	28.4	9.3	22.1	22.8	24.0	38.5	38.3	38.6	7.1	14.7
1880	25.6	8.5	19.2	20.5	20.5	36.1	36.8	35.2	7.4	16.8
Part owners										
1910	9.3	3.1	5.5	11.7	16.1	6.4	6.9	7.6	8.6	10.9
1900	7.9	2.9	4.4	10.0	14.5	4.9	5.0	5.5	8.3	11.3
Managers										
1910	0.9	2.8	1.9	1.0	0.8	0.7	0.3	0.5	1.6	2.8
1900	1.0	2.5	1.7	1.0	0.8	0.9	0.5	0.7	3.4	2.9
Owners proper										
1910	52.7	86.1	70.3	60.3	52.3	46.9	42.1	39.1	79.1	69.1
1900	55.8	85.2	68.5	62.8	55.1	49.9	46.3	44.8	76.1	66.1

The farms operated by part owners and managers were doubtless classified with those of owners proper in 1880 and 1890. There has been a tendency to adopt the same practice in present-

¹⁵Census, 1910, V, 122, 123.

ing the tenure statistics for 1900 and 1910, especially where comparisons with the earlier dates are being made. So far as the managed farms are concerned, the error involved in counting them in with the farms operated by owners is not great. There was no section in which managed farms constituted more than three per cent of all farms in 1910. For some purposes it is desirable to regard the farms of part owners as not essentially different from the farms of owners proper. In 1900 the farms of part owners contained, on the average, nearly 5 acres more of owned land than the average farm entirely owned by the operator.¹⁶ The part owners constituted 9.3 per cent of all farm operators in 1910.

The tenure statistics based on farms afford a good idea of the numbers of the various kinds of operators. Tenure data based on acreage, however, give some slightly different impressions. The cause of the variations is the fact that farms differ in size between various tenures and sections.

The average acreage of all farms declined from 146.2 in 1900 to 138.1 in 1910.¹⁷ Only the farms of the North Central states showed a tendency to increase in size. The divisions where small farms prevailed in 1900 underwent a still further reduction in the size of operating units by 1910.

In the North East quarter of the country and in the Mountain and Pacific divisions, on the other hand, the size of tenant farms was greater than that of the farms operated by the owners. As a rule, however, the tenants operated farms less than two-thirds as large as those operated by the owners. In the South Central states the tenant farms were between a third and a half as large, on the average, as the farms of owners.

The farms of part owners were approximately twice as large as those of owners proper in 1900, but fell off nearly 20 per cent by 1910, while the farms of owners proper underwent a slight increase during that period. The enormous farms of managers were in the territory west of the Mississippi river, where the farms of all tenures, except tenants in the West South Central states, were much above the general average in size.

On the basis of farms, tenancy was most marked in the Southern states. The number of tenant farms and the percentage of farms operated by tenants in the states of those divis-

¹⁶See below, p. 21.

¹⁷Census, 1910, V, 114, 137.

ions has been so great and increasing so rapidly¹⁸ as to give more or less alarm to some students of the situation. When, however, the statistics of tenure are placed on the basis of acreage, as in the next table, the percentage of tenancy in the South loses much of its alarming magnitude. This is due to the small size

PERCENTAGE OF FARM ACREAGE OPERATED UNDER VARIOUS FORMS OF TENURE,
UNITED STATES, 1900-1910.¹⁹

	United States	New England	Middle Atlantic	East North Central	West North Central	South Atlantic	East South Central	West South Central	Mountain	Pacific
Tenants										
1910	25.8	7.8	25.9	30.0	27.0	30.1	27.9	26.7	10.6	19.8
1900	23.3	9.4	28.6	27.3	23.6	30.6	27.4	19.0	9.4	19.5
Part owners										
1910	15.2	4.2	7.4	13.9	23.9	6.3	8.0	13.8	16.7	21.7
1900	14.9	4.2	5.9	11.7	23.7	4.7	5.8	17.7	22.0	19.6
Rented by part owners										
1910	7.4	1.6	2.1	6.2	11.5	2.4	2.7	6.4	8.9	1.1
1900	7.1	1.6	1.6	5.2	11.4	1.8	2.0	8.2	12.5	1.0
Owned by part owners										
1910	7.8	2.6	5.3	7.7	12.4	3.9	5.3	7.4	7.8	20.6
1900	7.8	2.6	4.3	6.5	12.3	2.9	3.8	9.5	9.5	18.6
Owners proper										
1910	52.9	82.5	62.7	54.1	47.0	60.4	52.1	47.9	53.2	43.1
1900	51.4	82.5	62.2	59.0	49.4	61.4	64.8	37.1	33.0	42.9
Managers										
1910	6.1	5.5	4.0	2.0	2.1	3.2	2.0	11.6	18.5	15.4
1900	10.4	3.9	3.3	2.0	3.3	3.3	2.0	26.2	35.6	18.0
All lessees										
1910	33.2	9.4	28.0	36.2	38.5	32.5	30.6	33.1	19.5	20.9
1900	30.4	11.0	30.2	32.5	35.0	32.4	29.4	27.2	21.9	20.5
All deed-holders										
1910	60.7	85.1	68.0	61.8	59.4	64.3	67.4	55.3	62.0	63.7
1900	59.2	85.1	66.5	65.5	61.7	64.3	68.6	46.6	42.5	61.5

¹⁸In Texas the number of farm tenants increased from 174,991 in 1900 to 219,575 in 1910. (Census, 1910, V, 213.) In Mississippi the percentage of farms operated by tenants increased from 62.4 in 1900 to 66.1 in 1910. (Census, 1910, V, 126.)

¹⁹Census, 1900, V, 308; 1910, V, 114.

of the tenant farms in that region. The social significance of tenancy in the South is not minimized, however, but rather augmented by the fact that great numbers of tenants operate small farms. On the basis of acreage the East North Central division is nearly abreast with the South Atlantic division in the percentage of tenancy, while the West North Central states stand between the East and West South Central groups. On the whole, the percentages of tenancy are much more nearly uniform in the various divisions when the statistics are based upon acreage than when based upon farms.

Because of the large size of their farms, the proportion of farm land operated by part owners and by managers is much larger than the number of such operators would indicate. In 1910 the part owners operated three-fifths as much farm land as the tenants. They hired nearly half of this land. Counting both the land hired by part owners and the land hired by tenants, the data indicate that in 1910 the leasing of farm land was most prevalent in the North Central states.²⁰

The percentage of farm land leased in the United States in both 1900 and 1910 was smaller than indicated by the data based on the number of tenant farms. On the other hand, while there was only a slight increase in the percentage of farms operated by tenants between 1900 and 1910, the proportion of the farm land operated under lease was considerably greater in 1910 than in 1900.

Managers controlled 6.1 per cent of the farm land in the United States in 1910. In the West South Central and Mountain divisions they operated between 10 and 20 per cent of the land.

In nearly all discussions of land tenure in the United States, only the statistics on farms operated by tenants have been employed, and the reader naturally supposes that the farms which are not operated by tenants are cultivated by their owners. The data on the percentage of farms operated by tenants²¹ suggests that (1) owners operated a smaller part of the land in the Southern states than in any other division of the country; that

²⁰The individual states in which the percentages of farm land operated under lease were highest are as follows: in 1900, Delaware, 59.5; Illinois, 45.2; and Maryland, 43.2 (Census, 1900, V, 142, 308); in 1910, Oklahoma, 63.1; Delaware, 52.8; and Illinois, 51.0. The figures for 1910 are estimates in the case of Delaware, where the error can be only slight, and in the case of Oklahoma, where the error may be large. (Census, 1900, V, 142, 308, and 1910, V, 124-126, 820.)

²¹See above, p. 14.

(2) the farms of the Mountain and Pacific states were almost exclusively in the hands of owners; and that (3) operation of farms by owners was declining between 1900 and 1910. Each of these three contentions must be modified or rejected when the statistics of acreage are examined. Outside of the New England and Middle Atlantic states, operation of land by owners was most prevalent in the East South Central and South Atlantic states. Ownership was least common in the West South Central and West North Central groups. In the territory east of the Mississippi river, ownership was less prevalent in the East North Central states than in any other division.

Operation by owners, while shown to be smaller by the data based on acreage than might be inferred from the more commonly quoted data based on farms, was more prevalent in the country as a whole in 1910 than in 1900. It appears, therefore, that while the trend in the tenure of farms was somewhat toward tenancy, the trend in the tenure of farm land was toward a relative increase of both the leased and the owned acreage at the expense of the acreage controlled by managers. This was true especially in the West South Central, Mountain and Pacific divisions. In the Middle Atlantic states the trend was toward ownership because of the decline in the percentage of farms run by tenants. In the North Central states, however, both east and west of the Mississippi river, and in the East South Central states, the trend was toward land leasing and away from operation by the owners.

MORTGAGE ENCUMBRANCE ON OWNED LAND

Although approximately 6 out of 10 acres are operated by the owners in the United States, in many cases the nominal owners hold only an equity in the land. Statistics on farm mortgages were gathered in 1890, 1900 and 1910. They related only to farm land operated by the owners, the part owners in most cases having limited their reports to the land owned by them.²²

The percentage free from mortgage in the United States declined from 71.8 in 1890 to 66.4 in 1910.²³ The percentage of

²²Census, 1910, V, 157.

²³Census, 1910, V, 160, 162. The report for 1910 "covers only farms which consisted wholly of land owned by the operator and for which the value of land and buildings and the amount of mortgage debt were reported;" whereas the report for 1890 "covers all owned farm homes, estimates being made for all farms with defective reports; the statistics cover only the land owned by the farmer in the case of farmers renting additional land."

farms operated by owners under mortgage in 1910 was greater in the West North Central group of states than in any other division, although that division was the only one in which there was a decline from the percentage prevailing in 1890. The district having the highest percentage of farms operated by owners encumbered east of the Mississippi was the East North Central division. Mortgaging of farms operated by owners appears to have been least common in the Southern states, although compared with the percentages prevailing in 1890 in those divisions the practice appears to have been growing with remarkable rapidity.

Outside of the two North Central groups, there appears to be no correlation between the percentage of land leased and the extent to which the owned land is mortgaged. In those divisions, however, we find both the highest percentage of the farm land operated under lease and the highest percentage of the remainder of the farm land owned under mortgage.

In all sections of the country there was a decline in the ratio of debt to value of farm property between 1890 and 1900. The equity increased from 64.5 per cent in 1890 to 72.7 per cent in 1910.²³ This was in spite of the increase of 40.1 per cent in the amount of indebtedness on the average American farm between the two dates. The amount of equity increased 106.0 per cent. It seems, therefore, that the rise in the value of mortgaged farms was so great that the increase in mortgage debt could not keep up with it. This was less true of New England and the Middle Atlantic states than of the remainder of the country. The proportion of the value of mortgaged farms covered by mortgage was highest in those divisions in 1910.

To summarize, in 1910 in the United States as a whole 33.2 per cent of the farm acreage was operated under lease, 6.1 by salaried managers, about 20.4 by owners under mortgage,—the mortgage indebtedness representing 27.3 per cent of the value of the farms. Only about 40 per cent of the farm land was operated by owners clear of mortgage encumbrance.

CAUSES AND CHARACTERISTIC FEATURES OF PREVAILING FORMS OF TENURE.

The conditions underlying the various forms of tenure in American agriculture may, for the sake of convenience, be considered from three points of view. It is important in the first place, to understand the position of the owners of land, and of the farm operators. A consideration of the question which

²³*Ibid.*

form of tenure best conserves the land and improves farm production requires a somewhat different outlook. The relation of the various forms of tenure to the general economic conditions of the nation is a third point of vantage from which to study tenure.

There are numbers of cases where the owners of land could not well keep from being landlords. In the case of women and children inexperience or immaturity as a rule unfits them for operating farms. Owners of land in extraordinarily large tracts, or in tracts widely distant,²⁴ frequently find that it pays them best to rent some and operate the rest of their soil. Owners sometimes rent their land so that they may devote their time to other interests, such as travel, politics, business,²⁵ health, or some special service. Such interests often cause the owner to discontinue the operation of his farm for a number of seasons and sometimes to quit active farming altogether. Again, when an owner and his wife become advanced in age their increasing dependence on hired help in the field and in the home often makes it advisable for them to give up the operation of their land.

A second class of owners consists of those who become land holders through inheritance or purchase. When the title to farm land passes to heirs, they often arrange to have the land operated as a unit by some renter, quite frequently one of their own number. The few who obtain land through the foreclosure of mortgages often value the land from the speculative point of view. Many others who purchase land are also to be regarded as speculative buyers. Such land owners, awaiting a favorable turn in the price of land, are seldom inclined to incur the expense of installing the managerial system and naturally prefer short-lease tenants. When corporations, such as coal, railway, gas, oil, or land improvement companies, own farm land its cultivation is usually of incidental importance to them, even in cases where the land remains more or less permanently in their hands. A condition of this kind is conducive either to managerial or tenant cultivation.

²⁴In the United States 11.4 percent of the owners of rented farms owned two farms in 1900; 5.4 percent owned three or four farms; 2.3 percent owned five to nine farms; and 0.9 percent owned ten or more farms. See Census, 1900, V, lxxxviii.

²⁵A large number of country bankers, for instance, are so-called "banker-farmers". Not all of these were farmers, however, before they were bankers. See Stewart, C. L., *An Analysis of Rural Banking Conditions in Illinois*, 4, 5.

Perhaps the most numerous class of landlords is made up of those who seek retirement from the farm.²⁶ Many owners leave the farm so that the children may start operating the home place, unhampered by lack of house room, and with greater freedom to work out their problems. It frequently happens that the parents move to town so that the children may be at home with them while launching into their school, business or society careers. Parental considerations, however, are often of no more influence than the desire to get away from the objectionable features of rural life, and to get easier access to the institutions and facilities of the city. When farmers retire, they usually rent their farms either to a relative by birth or marriage or to a trusted farm hand.

Part owners are operators who hire land to cultivate in addition to land of their own that they farm. Some statistical facts concerning part owners are presented in the following table.

AVERAGE ACREAGE OWNED AND HIRED BY OWNERS, PART OWNERS AND TENANTS,
UNITED STATES, 1900-1910.²⁷

Census year	Average number of acres				Percent- age of partly owned land hired	
	Operated by part owners	Hired by Part owners	Ten- ants	Owned by Part owners proper		
1910	225.0	111.4 ²⁸	96.2	113.6 ²⁸	138.6	49.5 ²⁸
1900	276.4	136.8	96.3	139.6	134.7	49.5

²⁶While it is not correct to assume that the number of farmers living in retirement is equal to the number of rented farms whose owners do not live in the same county, a reference to the latter data may be useful at this point. In 1900, of the 95.5 percent of the rented farms for which reports were obtained, all but 20.3 percent reported the owners to be residents of the same counties as that in which the respective farms are located. The owners of 15.2 percent of the farms were located in other counties of the same state, and in the case of 5.1 percent of the farms were located in other states. See Census, 1900, V, lxxxvii.

No doubt there are instances where the landlords living in adjoining counties are closer to their farms than some living in the same county in which their places are located. The same thing doubtless applies in the case of owners living in other states. On the other hand, the residence of owners in the same county does not guarantee a close interest in operations carried on by their tenants.

²⁷Census, 1910, V, 99 and 1900, V, 308.

²⁸Estimated to make the percentages identical in the last column.

Though practically half of the land in the farms of part owners was hired the owned acreage was so nearly comparable to that of operators owning their entire farms that it seems natural to assign the part owners an economic status even higher, on the average, than that of owners proper. It is gratifying to note, therefore, that in spite of the decline in the size of partly owned farms, the percentage of all land operated by part owners increased from 14.9 in 1900 to 15.2 in 1910.²⁹ The percentage of their land that was improved was 45.5 in 1900 and 56.9 in 1910, as against a percentage of 50.6 at the latter date for the land of operators owning their entire farms.³⁰

Tenancy, when practiced by part owners, seems to be usually a matter of choice. By renting additional land part owners practically double the scale of their operations without requiring any great increase in the amount of money they have invested. They are limited in the area from which they may choose land to rent, but in most districts there is usually enough land for rent near their places. Sometimes they afford almost the only means an owner can find to get a piece of land operated without equipping it with buildings. Part owners, therefore, may often rent good land on favorable terms. On the other hand, since part owners may not ordinarily be expected to build up the fertility of the land they hire as carefully as that of the land they own, it is only natural that some landlords prefer not to rent land to them.

Often the farm of a part owner is the area comprised in an estate that has been divided among heirs. In such cases the partition of a farm at the death of the former owner destroys the unity of ownership without destroying the unity of operation.

The large size of the partly owned farms affords evidence that some experienced farmers are in favor of expanding the area cultivated in place of intensifying the cultivation of small farms. This economy arises in part from the fact that the building equipment of the area owned by the part owner does service for the hired area as well. Where pieces of land are found without independent equipment in buildings part ownership is a form of tenure to which resort is commonly had. A tendency to reduce the size of holdings in districts of large-scale farming often results in an increase in the prominence of part ownership.

In a number of the Southern states the place of colored

²⁹See above, p. 16.

³⁰Census, 1910, V, 97.

tenants is one of great significance. In four states, Mississippi, South Carolina, Alabama and Georgia, over half of the tenants in 1910 were colored, and their numbers aggregated 415,947.³¹ Ten years previously the number of colored tenants in the same states was 324,964. The white tenants in these states were outnumbered by colored tenants nearly 2 to 1 in 1910.

The tenants of the Southern states must be sharply distinguished from those in other parts of the country. For the most part they operate cotton farms of twenty acres, are under the supervision of the owner of the farm, are in debt for most of the one or two hundred dollars worth of property they own, and are dependent upon lien holders for their subsistence from season to season. In the Northwest, on the other hand, the tenant is practically as independent as if he owned the land, owns property worth thousands of dollars, and conducts his farm and business operations entirely as suits him; in the East the tenant must engage in highly intensive farming; and in the newer West he is operating land recently taken up from the public domain.³² Tenancy in the South should by no means be confused with tenancy in other parts of the United States.

Somewhat of an indication of the economic status of tenants is afforded by the kind of basis on which they pay rent—whether they pay a fixed amount of cash per acre, or a share of the products. The census did not report “share-cash”³³ tenants separately before 1910, and until that date followed the practice of including tenant farms whose basis of rental payment was unspecified with the cash tenant farms. The following table shows the difference between the kinds of farm properties operated by the two major classes of tenants which, for the sake of brevity, we may call share and cash.³⁴

³¹Census, 1910, V, 210-213.

³²Hibbard, B. H., in *Quarterly Journal of Economics*, XXV, 710-711.

³³“Share-cash” tenants are those who pay cash for part of the land rented by them and pay a share of the products for part.

³⁴The number of all tenants in the United States increased from 1,024,601 in 1880 to 2,354,676 in 1910. The number of share tenants increased from 702,244 in 1880 to 1,528,389 in 1910. The corresponding increase in the number of cash tenants was from 322,357 to 826,287. The percentage of all tenants renting for cash was 31.4 in 1880, 35.2 in 1890, 37.3 in 1900 and 35.2 in 1910. See Census, 1910, V, 102.

THE AVERAGE ACREAGE OF LAND, TOTAL AND IMPROVED, AND THE VALUE OF
VARIOUS KINDS OF PROPERTY PER FARM OF SHARE AND CASH
TENANTS, UNITED STATES, 1900-1910.³⁵

	Total	Improved	Total	Land	Buildings	Implements and machinery	Live stock
Share and share-cash							
1910	93.2	69.1	\$5222	\$3945	\$ 615	\$ 131	\$ 530
1900	92.4	65.0	2647	1853	386	89	319
Cash and unspecified							
1910	101.7	61.3	\$5613	\$4139	\$ 710	\$ 146	\$ 620
1900	102.9	56.7	3003	2100	423	92	388

It appears that the cash tenants have been operating larger and more valuable farms than the share tenants. The comparative difference in values, however, is not a great one per farm and a still smaller one per acre.

On the possibility of improvement in economic status of farm tenants we have little statistical evidence. There can be no doubt, however, that there are tenants who are not in a financial position to own any farm land, though they would regard the buying of land as a desirable and natural step to take. On the other hand there are tenants who, though financially able to own farm land, do not prefer to invest their capital in land.

Ordinarily the members of the first class can choose between operating land as renters, hiring themselves out as farm laborers, and seeking a livelihood in some pursuit other than agriculture. Allowing for the loss and trouble connected with changing from their present status, it may be assumed that such tenants remain in that class because of the favorableness of the terms they are able to make with the landlords. Some of these tenants succeed in saving money. Others live such a shiftless, hand-to-mouth existence that they show little evidence of ever being able to make much improvement in their condition. Perhaps the most striking examples of this class of tenants are to be found among the poorer negro tenants of the South. Since the owners of the more valuable farm land prefer to rent to the more capable

³⁵Census, 1910, V, 100.

tenants,³⁶ those who stand lowest in the scale of non-owning tenants will ordinarily tend to gravitate toward the less valuable lands.

Those tenants who regard tenant operation as a better means than land ownership for accumulating money have in their number some who are of high economic standing. They are often of such a character as to attract the attention of owners desiring the higher class of tenants. Once well established they are likely to prefer and to be able to secure longer leases and fairly permanent tenure. Tenants of this class are found mainly in the districts where the price of land is high in comparison with the value of its products.

On the whole, it seems that the transition of which tenancy is the middle stage has, for most farmers, been toward higher rather than toward lower economic conditions.³⁷ It is the prevailing belief, however, based upon statistics of tenant farms, "that the stepping-stones of tenancy are getting somewhat farther apart and the passage over them to ownership beyond becoming correspondingly more difficult of accomplishment."³⁸

RELATION OF TENURE TO FARM PRACTICE.

The tenancy practiced by part owners is renting in as true

³⁶Taylor, H. C. *Introduction to the Study of Agricultural Economics*, 59-65.

³⁷A certain amount of evidence on this problem is afforded by the statistics on ages of farm operators and home occupiers. The percentage of farmers who were renters exceeded 50 in the two age groups under 35 in 1890, 1900, and 1910. The older age-groups showed a constantly declining percentage of farmers who were renting, and a corresponding increase in the percentage of farmers who were owning. The indication is, therefore, that advance in age has been associated with advance in status of tenure. The percentage of ownership in the younger age-groups, however, was less in 1910 than in 1900 and less in 1900 than in 1890. It seems that the greater burden of the decline in ownership was being borne by the younger farmers.

The extent to which the age of a farmer affects the amount of mortgage encumbrance he carries on his farm is not so marked as the effect of age upon the tenure status. Owners 55 years old and over have very little mortgage encumbrance,— more at the last census than previously. The age-group with the highest percentage of owners encumbered in 1890 was that between 25 and 34, while in 1900 and 1910 the age group, 35 to 44, had the highest percentage, with an increasing concentration on it in 1910. See Census, 1900, Part II, cxi; 1900, Bulletin on Age of Farmers, 9, 22.

³⁸Hibbard, B. H., in *Annals of the American Academy*, XL, 29-39.

a sense as that carried on by tenants proper. The part owners, however, are usually more fixed to the community and are bound by deed to a part of the land they operate. In the case of "estates" regard for the "old place" and for the other heirs may induce the heir in charge of the operations to treat the land he rents as well as that which he owns. The expectation of eventual ownership of the rented land is greater in the case of part owners than in the case of most tenants, and this exerts an influence in the direction of better treatment of the rented land. Farming by part owners, in such cases, differs little from that conducted by those owning all the land they operate.

At the twelfth census farms were classified according to their principal sources of income, and by various forms of tenure.³⁹ From this investigation it appears that in 1900 managerial operation was relatively most prominent in the case of farms whose principal source of income was fruits, dairy produce, rice, sugar, flowers, plants, and nursery products. Tenants were relatively most prominent in the production of vegetables, tobacco and cotton. In the case of hay and grain farms part owners and share tenants operated more than their share. Livestock farming was carried on by "owners-and-tenants",⁴⁰ by part owners and by owners, to a disproportionately large extent.

It appears that hay and grain farming was given greatest relative emphasis by the share tenants and part owners; that livestock raising was more largely practiced by the owners-and-tenants, owners proper, and part owners; and that dairying was carried on chiefly by the owners. The tenants, therefore, have been concentrating on the production of staple products, managers have preferred the lines requiring great emphasis on supervision of labor force, while owners have been associated with a more highly diversified and capitalized form of farming industry. From the point of view of farm practice, tenure is an expression of the adaptation of the operator to the requirements of the type of farming. On the other hand, there has doubtless been some adjustment of farm practice by the operators to suit the requirements of their form of tenure.

³⁹The percentage of farms listed under each principal source of income was as follows: hay and grain, 23.0; vegetables, 2.7; fruits, 1.4; livestock, 27.3; dairy produce, 6.2; tobacco, 1.9; cotton, 18.7; rice, 0.1; sugar, 0.1; flowers and plants, 0.1; nursery products, less than 0.1; and miscellaneous, 18.5. See Census, 1900, V, liii-lv.

⁴⁰"Owners-and-tenants" refers to cases where tenants and operating owners combine their efforts in the operation of farms.

Land makes demands upon farmers either for capital to own it or for capital and skill to operate it. High prices for the land do not in themselves induce tenant-farming,⁴¹ unless the purposes to which such land may be put are such that tenants can qualify as operators. If large-scale production is at a premium on the high-priced land, then the standardization of farming method and the costliness of farm ownership may encourage tenant cultivation. In any case, financial and technical qualifications of the tenants to carry on the type of farming to which the land is adapted are prerequisite to the prevalence of tenancy.

The importance to the tenant of technical knowledge and of capital goods is especially to be noted when there is a change in the type of farming prevailing in a region. The introduction of cereal growing into certain parts of the South has caused a temporary withdrawal of tenants from operation there.⁴² Cereal growing, where it is an established feature of the agriculture of a region, is ordinarily practiced to a high degree by tenants. As the methods of grain farming become widely known in the Southern districts introducing it and as investments in the special types of equipment become better understood, we may expect the same association of tenancy and cereal growing there as in other parts of the country.

Lack of adequate capital to invest in the ownership of land tends to increase the supply of tenants when the methods of farming the land are standardized and well known. Persons with adequate knowledge of farming method seek to manage, rent or own in part—possibly under mortgage—farms for the complete and unencumbered ownership of which they lack sufficient capital.

The importance of the influence of both these factors, the lack of capital for land purchase in increasing tenancy and the lack of operating capital and efficiency in decreasing tenancy, must continue to grow as heavier demands are made for capital and operating efficiency. The annual gain to the landlord from unearned increment must constitute a diminishing percentage of

⁴¹The price of land and the size of farms are given considerable emphasis in the writings of most of those treating the subject of tenancy. See particularly Taylor, H. C., *Introduction to the Study of Agricultural Economics*, 244-250; and Hibbard, B. H., *Annals of the American Academy*, XL, 29-39, and *Quarterly Journal of Economics*, XXV, 712-719; XXVI, 107-109, 364-369; XXVII, 483.

⁴²*Community Service Week in North Carolina*, 44.

the value of the land and of the total annual increase in the landlord's wealth.⁴³ Great emphasis must, therefore, be placed upon operating efficiency in increasing farm incomes. The landlords may be expected to apply more thorough-going tests to ascertain the farming ability of tenants. This will not only tend to hold tenancy in abeyance, but will accompany a regime of better farming by those operating under all forms of tenures.

TENURE AND THE EXPANSIBILITY OF THE FARM AREA

Land tenure may, in a general way, be regarded as affording an expression of the relation of the population to the supply of cultivatable land. The accompanying table affords some data on this relation. From 1850 to 1880 the acreage of improved land in American farms increased 151.9 per cent, while population increased 116.3 per cent. The improved acreage per capita was 4.9 in 1850 and 5.7 in 1880. From 1880 to 1910 the population increased 83.4, while the improved farm acreage increased 68.0

PER CAPITA ACREAGE OF LAND IN FARMS, AND PERCENTAGE OF INCREASE OVER PRECEDING CENSUS RETURNS IN POPULATION, NUMBER OF FARMS, ACREAGE OF FARM LAND AND VALUE OF FARM PROPERTY, UNITED STATES, 1850-1910.⁴⁴

Census Year	Per capita acreage of land in farms		Percentage of increase over preceding census							
			Population	Number of farms	Acreage of land in farms		Value of Farm Property			
	Total	Im- proved			Total	Im- proved	Total	Land and buildings	Implements and machinery	Live stock
1910	9.6	5.2	21.0	10.9	4.8	15.4	100.5	109.5	68.7	60.1
1900	11.0	5.5	20.7	25.7	34.6	15.9	27.1	25.1	51.7	33.2
1890	9.9	5.7	25.5	13.9	16.3	26.6	32.0	30.2	21.6	45.4
1880	10.7	5.7	30.1	50.7	31.5	50.7	36.2	37.0	50.1	28.2
1870	10.6	4.9	22.6	30.1	0.1	15.8	12.1	12.0	10.1	12.9
1860	13.0	5.2	35.6	41.1	38.7	44.3	101.2	103.1	63.4	100.2
1850	12.7	4.9	.....	.....	.....	.....	.....	.....	.....	.....

PERCENTAGE OF INCREASE OVER THIRD PRECEDING CENSUS.

1880-1910	83.4	58.7	63.9	68.0	236.5	241.3	221.2	212.3
1850-1880	116.3	176.7	82.6	151.9	207.0	211.7	168.2	189.0

⁴³See below, pp. 123, 124.

⁴⁴Census, 1910, V, 51, 57.

percent and the improved acreage per capita declined from 5.7 to 5.2.

But for an extraordinary expansion in the unimproved acreage between 1890 and 1900, the acreage of all land in farms per capita would probably have shown a tendency to decline after 1880 similar to that shown by the improved acreage. The expansion of the farm area between 1890 and 1900 was probably due, in a measure, to the belief on the part of some persons that it was best to get desirable new land before it became too late.⁴⁵ From 1900 to 1910 the expansion of the farm area was hardly possible without resort to somewhat inferior types of soil. As a consequence increased attention was paid to improving the acreage already in farms. The relative increase in the ratio of improved land to all farm land was greater between 1900 and 1910 than for any decade ending after 1880. That there was an increased demand for farm products in comparison with the area supplying them is indicated by the rise in price of farm products. This affected the profits of farming and helped augment the price of farm land. The relative increase in the value of land and buildings per acre was greater during the decade, 1900 to 1910, than during any other census decade of the sixty years.

The effect upon land prices was probably greatest in the case of land producing those staple products the area of whose production had previously been expanding more nearly in response to the demand for the products. The effect was not so important, therefore, in the case of cotton lands, but was very pronounced in the case of land producing the important cereals.

The relation of land prices to tenure during the recent decades can be best examined, therefore, in the case of cereal-growing districts. That will be done here for the state of Illinois.

⁴⁵The percentage of the land area in farms in 1910 was 46.2, 1900, 44.1, and 1890, 32.7. More significance is to be attached to the smallness of the increase between 1900 and 1910, perhaps, than to the fact that over half of the land had not yet been included in farms.

CHAPTER II

TENDENCIES IN THE AGRICULTURAL ECONOMY OF ILLINOIS

It is impossible to understand the agricultural economy of a state like Illinois without keeping constantly in mind the physical features and soil conditions that give character to the state.

The surface of Illinois, for the most part, slopes gently from the north to the south, except in the extreme Southern part of the state where a spur of the Ozark hills rises rather abruptly from the plains to an altitude of approximately one thousand feet. The altitude along the rivers in the Southern part of the state is about three hundred feet above sea level, in the Central part between seven and eight hundred feet, and in the Northern part about one thousand feet.

PHYSIOGRAPHIC INFLUENCES

The state has a variety of soils, as indicated by the soil map.¹ Unglaciated areas are to be found in three portions of the state—in the Southern part, where the Ozark hills appear to have obstructed the progress of the glaciers; in the point of land between the Illinois and Mississippi rivers; and in the Northwestern corner of the state. All the rest of the state has been glaciated at least once, and some sections were covered a number of times.

The profound influence of the glaciers upon Illinois agriculture was exerted through their effect upon the topography and to a less extent, perhaps, upon the quality of the soil.² The difference in yields per acre in the various glaciated districts is considerable, but the difference in land prices is much greater. The unglaciated regions, being more broken, are less suited to

¹Hopkins, C. G., *The Fertility in Illinois Soils*, following 192.

²The dominant soil type in all but Southern Illinois, is a dark brown to black silty loam underlaid by a yellow gray, or drab stiff silty loam subsoil. Associated with it, and particularly in the timbered areas along the streams, is a yellow to yellowish-brown silty loam surface underlaid by a yellow silty subsoil. In Southern Illinois the deposit of loess over the underlying glacial materials is thin. The soil in Southern Illinois is principally a gray silt loam underlaid by a stiff gray silty clay. See Census, 1910, V, 897-898.

cultivation by modern farm machinery and to hauling heavy loads. The glaciated regions have better water supply, and suffer less change in the fertility of the soil because of erosion.³

The extent of the timber growth in the various parts of the state affords a good index of the general physiographic conditions. The mere presence of natural timbers usually implies that the land is either broken or swampy. This fact alone would tend to cause the timber land to be less easily cultivated, even when cleared. There is the further fact that timber operated against the accumulation of the organic elements so important for the growing of crops.⁴ This is attested by the fact that while the productiveness of the timber land was somewhat improved after it was cleared, the distinction between the old timber land and the old prairie land still stands out with appreciable sharpness. Just what part of the difference in fertility in different sections is due to the fact of former timber influence and what portion is to be explained by geological formation, is, of course, indeterminate. The sharpest line of demarcation between soils in Illinois, when considered from the point of view of productiveness, is found, however, where the same line divides an old timbered from an old prairie district, and at the same time a district of a later from that of an earlier glaciation.⁵ This line may be roughly indicated as running from East St. Louis to Shelbyville, the seat of Shelby county, and

³Mosier, J. G., Effect of Glaciers on Illinois Agriculture, in *Illinois Agriculturist*, June, 1914, 533, 534.

⁴Upon the withdrawal of the last glacial sheet the assumption is that the grasses were first among the vegetable growths to cover the land of the state. The area covered by trees, first limited to the unglaciated district, came to include more and more of the glaciated soil. The previous occupation of the land by the grasses made it more difficult for the seeds of trees to get into the soil, and the fires which burnt the grass periodically tended to destroy the incipient timber growth. The organic elements which worked into the soil as a consequence of the decay of the grasses are said to have made the soil still less hospitable to the growth of timber. The hardier, scrubbiest types of woodland growth could make their way somewhat better through this soil than the more characteristic types of timber. As the hardier types gained possession of the land, they reduced the hostile elements and made it possible for the other types to follow them. The expansion of the timber over the grass lands must have been very slow for it lacked much of being complete when the settlement of the prairie stopped it.

⁵Hall and Ingall, *Forest Conditions in Illinois*, 195.

thence east to the northwest corner of Clark county. South of this line the country was once nearly all covered with timber, while to the north the original forest was, for the most part, confined to the belts following the principal waterways.⁶

Timber was not only an index and feature of the physiography of the Illinois country, but was important in its influence upon early settlement and pioneer farm economy. The decided preference of the early settlers for woodland is supported by evidence in the recorded history of nearly every Illinois county.⁷ For the raising of hogs the mast of the woods and for the raising of cattle woodland shade and pasture were, during most of the year, superior to the natural or cultivated products which might, with satisfactory drainage, have been produced on the prairie. To be sure, a certain amount of hay and grain was necessary to tide the horses, hogs and cattle over the winter season, and some grain and hemp or flax was needed to feed and clothe the settlers themselves. The amount of arable

⁶*Ibid.*

⁷This is explained by a number of facts. The early settler had to have some land which was higher than the general level. This was necessary, first, to escape the ponds which covered the flat lands during the rainy seasons, producing malaria and making travel in and out difficult; and second, to be safe from the fires which swept the prairies in the dry seasons. Where high spots were found, timber was usually on them. The better drained land was ordinarily more broken and timbered. The woods afforded the source of fuel and of materials for stockades, houses, barns and fences, the overland transportation of which, whether as logs or rails, was a difficult matter, particularly in the wet seasons. The woods were usually to be found associated with rivers, springs and salt licks. The rivers were often the avenues by means of which settlers pushed on and by which they communicated with the markets and post offices. The springs afforded the source of water for the settlers and for the animals they kept or hunted. The salt licks provided a necessary article for the household and for the domestic animals, and of all places in the woods were probably the most strategic for killing wild game. Furthermore, the surrounding woods provided shelter from the extremes of the weather for both man and beast.

Among settlers for whom the woodland held such a monopoly of the indispensable conditions of pioneer life it is little wonder that a prejudice arose against the open prairie. Some of this prejudice may have been brought with them from their former homes farther East. The kind of economic life to which lack of facilities for drainage and transportation subjected them would only tend to strengthen such prejudice.

land sufficient to these purposes, however, was easily cleared, or fenced in from a natural clearing in the woods or from the edge of the prairie. It was the timber, nevertheless, that was the indispensable basis of the pioneer agricultural economy, while the prairie, beyond that which lay contiguous to the timber, afforded menaces by fire and by water, in the shape of disease and death. There is little wonder, then, that the prairie was looked upon by the pioneers as a hopeless waste.⁸

In order to sketch the development of Illinois we may employ several lines of census data.

POPULATION AND AGRICULTURE

From the population statistics of the Federal census and from the data of the quinquennial census conducted by the state itself a fair notion of the rate of this development may be drawn.

The population multiplied 459 times between 1810 and 1910.⁹ The periods in which the absolute growth in population was most marked were those extending from 1850 to 1870, and from 1890 to 1910. In relative increase the decades prior to 1840 took the lead, although a remarkable increase occurred from 1850 to 1860. The period of least relative increase in population was the one between 1900 and 1910. Until 1870 the rate of increase in population in Illinois exceeded that of the nation as a whole during each decade. The same thing was true of the decade, 1890 to 1900. From 1870 to 1890 and from 1900 to 1910, however, the rate of increase of population fell below

⁸It is sometimes said that the early settlers held the theory that the prairie was less fertile than the timber land, because the prairie grew vegetation that was much smaller. Owing to the conditions confronting the settlers, however, this theory could not have restrained them much until the improvements took place in transportation, in agricultural machinery and in drainage. When it became possible to till the land, to produce extensively and to market products other than those which could be driven on foot, cultivation of the prairies became at once possible and profitable. It is, of course, natural that some farmers should have insisted on clearing timber land, thinking that they would thus farm the richest land, when a vast area of richer prairie lay all ready to be tilled and broken up. But the view that the prairies were less fertile than the timber land probably did not restrain prairie cultivation to any great extent.

⁹See Census, 1910, I, 24 and V, 436 for authority for all statements in this paragraph.

that of the United States. The percentage of increase in the population of Illinois was less during the decade, 1900 to 1910, than during any other decade in the history of the state. Taken as a whole the growth of population was very rapid, especially until about 1870.

It is possible to determine the extent of the agricultural population of the state in only a rough way. Statistics of occupations were taken in 1820 and at each census from 1840 to 1910. The table on the next page has been prepared from the limited data at hand.

In Illinois in 1820, and from 1870 to 1910 the percentage of population engaged at gainful occupations was below that of the entire country, rising steadily, however, from 24.7 in 1820 to 40.7 in 1910.

The percentage of the occupied population of Illinois engaged in agriculture was 90.9 in 1820, and decreased to 19.0 in 1910. The virtual absence of slaves in Illinois in 1850 and 1860 leaves a greater comparative value in the statistics of occupations for those dates in the case of Illinois than in the case of the country as a whole. The decline in the percentage of occupied persons who were in agriculture was less abrupt in Illinois between 1860 and 1870. This is to be explained mostly by the fact that the number of persons in Illinois agriculture underwent its greatest decennial increase during that period. Up to and including 1870 a larger part of the population had been engaged in agriculture in Illinois than in the rest of the country. Between 1870 and 1880, however, the growth of other industries in the state was so marked, and since 1880, the number engaged in agriculture has undergone so little change that from 1880 to 1910 the percentage of population devoted to agriculture in Illinois was less than the corresponding percentage for the United States, and was decreasing much more rapidly.

The changes in the population of Illinois from 1890 to 1910 are analyzed in a table of the thirteenth census.¹⁰ The data show that, while the urban population has been growing both relatively and absolutely, and while the small town population has been growing absolutely, the population in strictly rural territory has been both relatively and absolutely declining.¹¹

¹⁰Census, 1910, II, 438.

¹¹The percentage of the total population of Illinois in urban territory was 44.8 in 1890, 54.3 in 1900, and 61.7 in 1910; in places having 2500 or less, 12.7 in 1890, 12.6 in 1900 and 12.0 in 1910; and in other rural territory, 42.5 in 1890, 33.2 in 1900, and 26.4 in 1910.

THE NUMBER OF THE TOTAL POPULATION, OF THOSE ENGAGED IN GAINFUL OCCUPATIONS AND OF THOSE IN AGRICULTURE, ILLINOIS; AND THE PERCENTAGE OF TOTAL POPULATION OCCUPIED, AND OF OCCUPIED POPULATION IN AGRICULTURE, UNITED STATES AND ILLINOIS, 1820, 1840-1910.¹²

Census year	Population	Number in all occupations	Persons in agriculture ¹³	Percentage of			
				Population occupied		Occupied population in agriculture	
				United States ¹⁴	Illinois	United States ¹⁴	Illinois
1910	5,638,591	2,296,778 ¹⁵	444,242	41.5	40.7	32.4	19.3
1900	4,821,550	1,840,040 ¹⁵	461,015	38.3	37.4	35.3	25.6
1890	3,826,352	1,353,559 ¹⁵	430,134	36.1	35.4	37.2	31.8
1880	3,077,871	999,780 ¹⁵	436,312	34.7	32.5	44.1	43.6
1870	2,539,891	742,015 ¹⁵	376,325	32.4	29.2	47.4	50.7
1860	1,711,951	395,937 ¹⁶	301,893	26.4	23.4	40.4	51.0
1850	851,470	215,359 ¹⁷	141,099	23.2	25.3	44.8	65.5
1840	476,183	124,204 ¹⁸	105,337	21.8	26.1	77.5	84.8
.....
1820	55,162	13,635 ¹⁸	12,395	25.8	24.7	83.0	90.0

¹²Statistics for each date were obtained as follows:

1910: Census, 1910, I, 30-31, and IV, 91, 97.

1900, 1890, 1880 and 1870; Census, 1900, Occupations, Introduction, 1 (following xlix); also Census, 1900, Occupations, 124; 1890, II, Population, 304, 314; and 1880, Population, 777, 793.

1870: Census, 1870, Population and Social Statistics, 704, 713.

1860 and 1850: Census, 1900, Occupations, Introduction, liii; also 1860, Population, 104-105, 680, and 1850, lxx-lxxix, 727.

1840 and 1820: Census, 1900, Occupations, Introduction, xxx; also 1840, 396 and 475, and 1820, Sheet 40.

¹³Exclusive of lumbermen, raftsmen, woodchoppers, apiarists, fishermen, oystermen, foresters, owners and managers of log and timber camps, and those in other agricultural and animal husbandry pursuits, so far as separately reported.

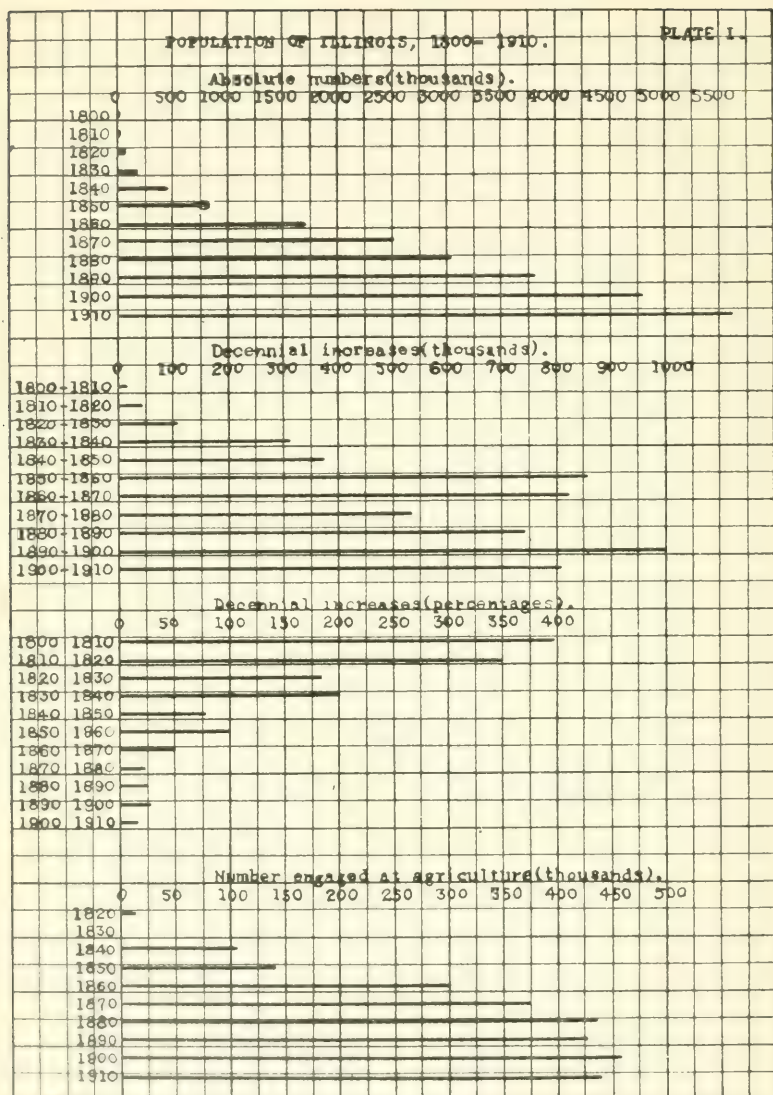
¹⁴See a table by the author in Bogart and Thompson: *Readings in the Economic History of the United States*, 608.

¹⁵Males and females over ten years of age.

¹⁶Free males and females over fifteen years of age.

¹⁷Free males over fifteen years of age.

¹⁸Males and females, free and slave, all ages.



The number of inhabitants of strictly rural territory per square mile of the total land area was 29.1 in 1890 and 24.8 in 1910. There were 16.2 per cent more people in the strictly rural territory in 1890 than in 1910.¹⁹

Of the thirty-two million acres of land in Illinois farms probably not over two million were taken up by 1820.²⁰ During the next thirty years approximately ten million acres were added to the farm area. Most of the land taken into Illinois farms during the first half of the nineteenth century was in the wooded districts of the state.²¹

Beginning with 1850 we have United States census data on the total and improved farm acreage and on the number of farms for each census date.

The percentage of the land area in farms increased from 33.6 in 1850 to 91.4 in 1900, but decreased to 90.7 in 1910.²² The percentage of farm land that was improved increased steadily from 41.9 in 1850 to 86.2 in 1910.

Until 1880 the growth of the area of land in farms was rapid, the total increase during the period, 1850 to 1880, being 163.1 per cent. During the thirty years between 1880 and 1910 the area of land in farms increased only 2.7 per cent, and actually declined during two decades. The acreage of improved land increased 418.2 per cent between 1850 and 1880, and only 7.4 per cent from 1880 to 1910. The farms were decreasing in average size from 1850 to 1880, but have been increasing somewhat since 1880.²³

The year, 1880, therefore, stands as the turning point in the direction in which the average acreage of farms was moving.

¹⁹See below, pp. 113-116.

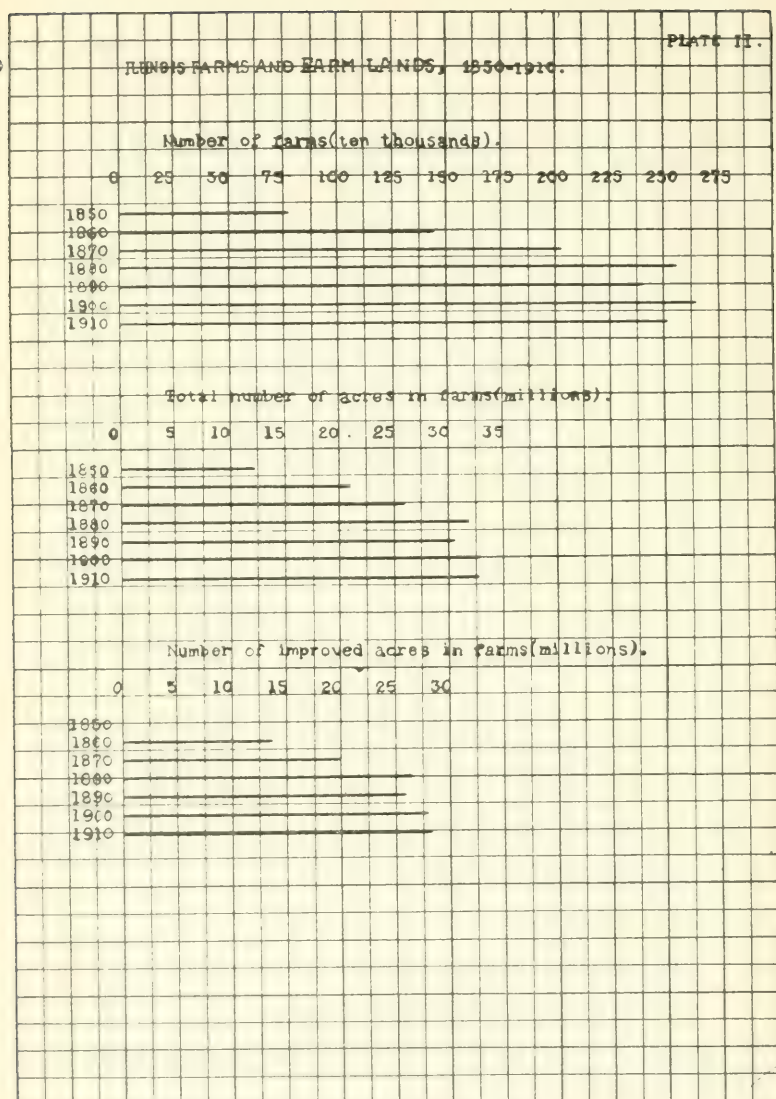
²⁰In American State Papers, Public Lands, Vol. III, 533, it appears that the five land agencies in Illinois, located at Shawneetown, Kaskaskia, Edwardsville, Palestine, and Vandalia, had reported to October 1, 1821, as follows:

Lands surveyed.....	13,799,040 acres
Reservations—private claims	529,046 acres
Amount sold	1,458,992 acres
Unsold	12,160,992 acres

²¹See below, p. 43.

²²Census, 1910, V, 69; VI, 412, 413.

²³To analyze these changes in greater detail, reference may be had to the Census, 1910, VI, 415; 1890, Agriculture, 118; and 1880, Agriculture, 26, 27. Such an analysis will show that from 1880 to 1910 the percentage of farms under 20 acres in size increased from 4.9 to 8.0; those between



It also marks the end of the large relative decennial increases in the total and improved farm acreages, in the number of farms and in the number of persons engaged in agriculture. Until 1880 the changes in Illinois agriculture were mainly in the area of farm land and the number of farms and farmers; since 1880 the greater changes have been in productions and values.

THE VALUE OF FARM PROPERTY

To illustrate the tendencies in the elements which went to make up the values in farm properties, the following table has been prepared.

AVERAGE VALUE PER ACRE OF ALL FARM PROPERTY, AND OF THE VARIOUS ELEMENTS OF FARM PROPERTY, ILLINOIS, 1850-1910.²⁴

Census date	All farm property	Per cent of increase	Land and buildings ²⁵	Per cent of increase	Implements and mach'y	Per cent of increase	Live stock	Per cent of increase	Index number ²⁶
1910	\$120.08	96.5	\$108.32	101.2	\$2.27	65.7	\$9.49	60.6	107.9
1900	61.12	26.2	53.84	30.0	1.37	21.2	5.91	0.2	91.2
1890	48.45	30.5	41.41	29.9	1.13	5.6	5.92	41.6	92.3
1880	37.12	8.7	31.87	12.0	1.07	0.0	4.18	9.7	106.9
1870 ²⁷ ..	34.15	43.2	28.45	45.4	1.07	30.5	4.63	33.4	117.3
1860	23.85	126.5	19.56	144.8	0.82	54.7	3.47	72.6	100.0
1850	10.53	.....	7.49	.....	0.53	.....	2.01	.....	101.0

20 and 100 acres declined from 47.9 to 36.2; those between 100 and 500 acres increased from 45.6 to 54.9, and those over 500 acres declined from 1.6 to 0.8. In 1910 approximately one-third of the farms had between 100 and 175 acres.

²⁴Census, 1910, VI, 413.

²⁵Land and improvements, except buildings: 1910, \$95.02; 1900, \$46.17; percentage of increase, 104.3.

Buildings alone: 1910, \$13.30; 1900, \$6.67; percentage of increase, 70.6.

²⁶The index numbers presented here follow the Falkner series from 1860 to 1900. A number for 1850 is supplied from the calculations of G. H. Knibbs (quoted by Irving Fisher). A ratio of comparison between the Falkner series and that used in the investigation of the United States Department of Labor was derived for 1890 and 1900 and a number as of the Falkner series calculated for 1910. (See Fisher, Irving: *Why the Dollar is Shrinking*, 150-163; *Aldrich Report on Wholesale Prices, Wages, and Transportation*; *Bulletin of the Bureau of Labor Statistics*, Wholesale Prices, 1890 to 1912).

²⁷Computed gold values, being 80 per cent of the currency values reported.

The data indicate a persistent rise in the value per acre of all the properties. The upward movement may have been promoted during the decades, 1860 to 1870 and 1900 to 1910, by the fall in the purchasing power of money, estimated at 17.3 and 18.3 per cent respectively. The upward trend of farm value, however, was much more rapid than that of the general price level. During the period, 1870 to 1900, farm property values increased in spite of the fall of 22.3 per cent in the general price level.

The largest decennial increments of value in the case of each item of property took place between 1900 and 1910, and the percentages of increase during that decade, even after allowance is made for the rise in the general price level, were greater than those of any other decade since 1860. In both absolute and relative increase in the case of each item the decennium, 1870 to 1880, stands lowest among the decades. During the period, 1870 to 1890, the increases in value were small compared with those characterizing similar periods preceding and following it. During the thirty-year period, 1850 to 1880, the increase in the value of land and buildings exceeded that which took place between 1880 and 1910, while the increase in the value of implements and machinery and of live stock was greater during the latter period. During the entire sixty years there was an increase in the value of all farm property per acre amounting to 1040 per cent. The increase in the case of each item of property was as follows: land and buildings, 1256 per cent; implements and machinery, 328; and live stock, 372.

The rate of increase in the value of farm property seems to have been accelerated about 1880 and again about 1900. This was true in the case of land more markedly than in the case of other kinds of farm property.

No less significant, perhaps, is the change in the relative prominence of the different forms of farm property in Illinois. The prominence of implements and machinery and of live stock as measured by their share in the total value of all farm property was two and a half times greater in 1850 than in 1910.²⁸ The part taken by the value of the land, however, rose from three-fourths in 1850 to nine-tenths in 1910.

²⁸Census, 1910, V, 93.

SOME CHANGES IN FARM PRACTICE

A general notion of the character of the farming practice in Illinois may be derived from the United States census reports. It is not possible, however, to make thorough-going comparisons with conditions prior to 1880 because of the absence of data on crop acreages before the tenth census. Production statistics of one kind or another are provided as early as 1840. The data on land in farms began with 1850 and it will be simpler, therefore, to limit the comparisons in most cases to the dates, 1850 and 1910.

A few comparisons based on an equal area of farm land²⁹ will suffice to show the main changes that have taken place with respect to some features of Illinois agriculture.

The number of cattle remained almost exactly the same. The number of dairy cattle, however, increased about 25 per cent. The number of horses doubled, and the number of mules, asses and burros increased fourfold. The number of swine remained about constant, while the number of sheep declined in 1910 to less than half the number reported for 1850.

The production of butter on farms increased between 1850 and 1880, and, though less in 1910 than in 1880, was 40 per cent greater in 1910 than in 1850. Cheese production on farms, while occupying a considerable place in 1850, had almost disappeared in 1910. The same thing is true of maple sugar. The production of tobacco and of wool was greater in 1880 than in 1850, but the figures for 1910 were smaller than those employed for either of the other dates. The production of Irish potatoes increased nearly once again during the sixty year period.

All of the cereals except barley had larger aggregate productions in Illinois in 1910 than in 1850.³⁰ The increase in the production of oats and rye during the sixty years was relatively greater than the increase in the area of all farm land, but was less than the increase in the area of improved land. The increase in the production of buckwheat was a little less than twice as great as that of the improved acreage. The corn and wheat pro-

²⁹The basis employed here includes both improved and unimproved land. Were only improved farm land considered, the figures for 1850 would be multiplied by 2.40, those for 1880 by 1.21, and those for 1910 by 1.16.

³⁰Census, 1910, VI, 446; 1900, VI, 62-93.

duction underwent a most phenomenal growth, increasing nearly three times as rapidly as the area of improved land. It is evident that cereals have been occupying an increasingly prominent place in Illinois agriculture.

The relative prominence of the different crops can be measured for the dates from 1840 to 1870 only on the basis of production. Beginning with 1880, however, the census reports show the number of acres devoted to the various crops.

The percentage of improved land devoted to hay and forage decreased between 1889 and 1909, and the percentage of improved land devoted to other crops decreased from 11.3 in 1899 to 9.2 in 1909.³¹ The percentage of improved land occupied by cereal crops in Illinois in 1879 was exceeded by the percentage in Nebraska, Minnesota, and Iowa; in 1889 by North Dakota and Minnesota; in 1899, by Nebraska and Minnesota; but in 1909 the percentage of improved land devoted to cereals in Illinois exceeded that of any other state.

Though data based on acreage are lacking for the period preceding the tenth census the statistics of production already cited seem to confirm the impression that the concentration on cereal-farming in Illinois received its main impetus about 1880. Up to that time the cereal productions had grown at a slower pace than that with which the improved acreage had expanded. From 1880 on, however, both acreages and productions of cereal crops have grown faster than the corresponding increase in the area of improved farm land.

A strong factor underlying the change in the direction and degree of agricultural tendencies in Illinois about 1880 is the increased cost of adding land to the farm area of the United States. The result was an increasing pressure and premium on the food-producing land of the country. The effect is seen in the acceleration given to the rise in farm property values and in the concentration on grain production on lands adapted to that branch of agriculture.

³¹Census, 1910, V, 554, 556.

CHAPTER III

CHANGES IN LAND TENURE IN ILLINOIS

The early agricultural economy described in the previous chapter may be regarded as one in which there existed a heavy dependence upon timber. As late as 1850 possibly 45 per cent of the land in farms was "woodland".¹ By 1870 the percentage of farm land classed as woodland had dropped to 20, by 1880 to less than 16, and by 1910, to 10.² Although timber determined the desirability of a district for occupancy by pioneers, it has come to be regarded as more or less in the way, except that a small amount is desirable for use as shade, ornament and source of wood for farm purposes.

The days when the farming of the state was based upon woodland must have been characterized by a very small amount of tenant farming. Land was then plentiful not only in other parts of the continent, but even within the state itself. The land was taken up pretty generally by heads of families seeking to establish farm homes. Some renting was carried on in the

¹In 1850 58.1 per cent of the farm land of Illinois was "unimproved". Certainly as much as three-fourths of this unimproved land was "woodland". The percentage of unimproved land classified as woodland in 1870 was 77.7, in 1880, 89.1 and in 1910, 70.7. The absolute figures were as follows:

Acreages	1910	1880	1870
Woodland	3,147,879	4,935,575	5,061,578
Other unimproved	1,326,735	622,916	1,491,331
Total unimproved	4,474,614	5,558,491	6,552,909

Census, 1910, V, 77; and 1880, Agriculture, 3, 11.

²The original timbered area of the state is said to have comprised about 30 per cent of the total land area, or about 10 or 11 million acres. At least 4½ or 5 million acres of timber land were in farms in 1850. In 1910 about 3 million acres of the old timber land were still classed as farm land, and at least 4½ million more of the old timber acreage must have been chiefly in the part called "improved", while the part of the old timber area in farms probably rose from about half in 1850 to three-fourths in 1910. At the latter date a large proportion of it had been cleared and converted into "improved" land.

case of tracts owned by non-residents, but under the circumstances the rents charged were usually very small.³

TENURE STATISTICS FOR THE STATE AS A WHOLE

The census of 1880 showed the number of tenant farms in Illinois to be larger than in any other state of the Union, and considerable capital was made of the "eighty thousand tenants,"⁴ then operating Illinois farms. In 1910, Illinois had 104,379 tenant farms, although her rank among the states in this respect had sunk to eighth.⁵ Texas, with 219,575 tenant farms, held first rank. At that date Illinois was second in the number of white tenants, having 103,761 against 170,970 in the state of Texas.⁶ Illinois stood eleventh in the percentage of all farms operated by tenants both in 1880 and in 1910.⁷ The percentage in Illinois in 1910 was 41.4, while in Mississippi, where the percentage was highest, it was 66.1. In the percentage of tenancy among white farmers, Illinois with 41.4 ranked sixth in 1910, Oklahoma with 55.8 holding first rank.⁸ In the farm acreage hired in 1910, Illinois stood third with 51.0 per cent.⁹ The percentage in Delaware was 52.8 and in Oklahoma exceeded 60.

The table on the following page summarizes for the state as a whole the available statistics on farm tenure.

It will be observed that the number of farms decreased between 1880 and 1910, while the farm acreage increased. The increase in the average size of farms was from 123.8 in 1880 to

³See Buck, S. J.: *Pioneer Letters of Gersham Flagg*, 35, 40, 46; Sheftel, Yetta, *The Settlement of the Military Tract*, Chapters I and II (in manuscript); Gerhard, Fred., *Illinois as It Is*, 404.

The rents were not low, because of the relative inferiority of the lands first taken up. As Walker points out, the lands first taken up, while now known to be chemically and otherwise inferior, were then economically superior. It was only when timber farm economy gave way to prairie farm economy that this economic superiority of the lands earliest occupied was lost.

⁴*North American Review*: CXLII, 52-67, 153-158, 246-253, 387-401.

⁵In 1890 the number of tenants in Illinois was the third largest among the states, and in 1900 it was fifth in order.

⁶The same order held also in 1900, the only other date at which white and colored tenants were reported separately.

⁷In 1890 the rank of Illinois was tenth, and in 1900, thirteenth.

⁸In 1900 a similar comparison shows the rank of Illinois as eleventh.

⁹In 1900 only Delaware had a larger percentage of her farm lands rated under lease than Illinois. See above, p. 17, note 20.

LAND TENURE IN ILLINOIS, 1880-1910.

<i>Number of farms</i> ¹⁰	1910	1900	1890	1880
Total.....	251,872	264,151	240,681	255,741
Operated by				
Owners and part owners....	145,107	158,503	158,848 ¹¹	175,497 ¹¹
Owners proper.....	107,300	124,128		
Part owners.....	37,807	34,375		
Managers.....	2,386	1,950		
Tenants.....	104,379	103,698	81,833 ¹¹	80,244 ¹¹
<i>Percentage of farms</i>				
Operated by				
Tenants.....	41.44	39.26	34.00	31.38
Owners and part owners..	57.61	60.00	66.00	68.62
Owners proper.....	42.60	46.99		
Part owners.....	15.01	13.01		
Managers.....	0.95	0.74		
<i>Number of acres in farms</i> ¹²				
Total.....	32,522,937	32,794,728	30,498,277	31,673,645
Operated by				
Managers	15,198,315	17,506,064	....	....
Tenants	14,177,411	12,668,748	....	....
Owners and part owners....	17,787,063	19,671,602	....	....
Owners proper ¹³	12,208,930	14,758,439	....	....
Part owners.....	5,578,133 ¹⁴	4,913,163	....	....
Hired by part owners.....	2,414,418 ¹⁴	2,165,538	....	....
Owned by part owners.....	2,989,385 ¹⁴	2,747,625	....	....
Hired by tenants and part owners.....	16,591,859	14,834,286	....	....
Owned by owners proper and part owners.....	558,463	454,378	....	....
<i>Percentage of farm acres</i>				
Operated by				
Managers.....	1.72	1.39	....	....
Tenants.....	43.59	38.63	....	....
Owners and part owners....	54.69	59.98	....	....
Owners proper.....	37.54	45.00	....	....
Part owners	17.15	14.98	....	....
Hired by part owners.....	7.42	6.60	....	....
Owned by part owners.....	9.73	8.38	....	....
Hired by tenants and part owners.....	51.01	45.23	....	....
Owned by owners and part owners.....	47.27	53.38	....	....

¹⁰Census, 1910, VI, 413.¹¹Part owners and managers were not separately classified in the

129.1 in 1910.¹⁵ The number of tenant farms increased from 80,244 to 104,379, while the number of farms operated by owners, part owners and managers, decreased from 175,479 to 147,493.¹⁶ The percentage of all farms operated by tenants rose from 31.38 in 1880 to 41.44 in 1910. The percentage of the farm acreage operated by tenants proper was 43.59 in 1910, while that hired by part owners was 7.42. The percentage of farm land operated under lease in 1910 was, therefore, 51.01.

The following table will show more definitely how the changes in farm and land tenure varied from decade to decade.

It appears that operation by owners decreased while operation by tenants increased during each decennial period. Between 1880 and 1890 the change lay in a decline in the number of owners rather than in an increase in the number of tenants. During the decade, 1890 to 1900, the reverse was the case. The number of farms operated by owners remained practically the same, while the number operated by tenants underwent a very large increase. During the decade, 1900 to 1910,

reports for these dates, and were included in most cases, perhaps, with owners rather than with tenants.

¹²Census, 1910, VI, 412, 414; 1900, V, 308.

¹³Author's calculation.

¹⁴Unpublished data were received from the census bureau and modified to repair the omission of data from Carroll, Lee and Massac counties. The percentage of the land in the farms of part owners operated by them under lease and under deed was assumed to be the same as the corresponding percentages in the other 99 counties of the state.

¹⁵See below, p. 87.

¹⁶The number of persons in agriculture in Illinois (See above, p. 35) exceeded the number of farms by 180,571 in 1880, 189,453 in 1890, 196,863 in 1900 and 192,370 in 1910. For each 10,000 persons in Illinois agriculture there were 4139 of these persons without tenure in 1880, 4405 in 1890, 4271 in 1900 and 4334 in 1910. In a similar number there were 1839 tenants in 1880, 1902 in 1890, 2240 in 1900 and 2350 in 1910. Likewise there were 4022 owners in 1880, 3693 in 1890, 3483 in 1900 and 3320 in 1910. In 1900 there were 746 part owners and 42 managers for each 10,000 persons engaged in agriculture in the state. In 1910 the figures were 851 and 54, respectively.

It appears, therefore, that the owners were the only persons in Illinois agriculture to decrease in relative numbers. Of the remaining classes, the ranks of the tenants received the largest relative number of accessions.

the number of tenant farms remained practically the same, while there was a sharp decline in the number of farms operated by owners.

Most of the increase of 31.8 per cent in the relative prominence of tenant operators took place during the decade, 1890 to 1900, while the decennium, 1900 to 1910, was characterized by the smallest increase of any decade since 1880.

When, however, the change in tenancy is expressed in terms of acreages, it is seen that the increase in the hiring of land between 1900 and 1910 was not so small. The number of acres hired increased 1,757,573, 12.7 per cent of the hired acreage in 1900. There was a decline of 550,176 in the the total farm acreage, so that the number of acres operated by their owners decreased 2,307,749, or 13.2 per cent.

The statistics usually employed—those based on the number of farms—indicate that the percentage of tenancy was 39.3 in

PERCENTAGE OF CHANGE IN THE ABSOLUTE NUMBER AND IN THE NUMBER PER 100 OF FARM OPERATORS, AND OF FARM ACRES OPERATED BY VARIOUS KINDS OF OPERATORS, ILLINOIS, 1880-1910.¹⁷

Basis and item	Direction and percentage of change			
	1880 — 1910	1900 — 1910	1890 — 1900	1880 — 1890
Absolute number				
Farm operators				
Owners ¹⁸	—16.0	—8.5	—0.2	—9.5
Tenants	+30.1	+0.6	+26.7	+2.0
Farm acres				
Deedholders ¹⁹ .....	.....	—13.2	.....	.....
Lessees ²⁰ .....	.....	+12.7	.....	.....
Number per 1000				
Farm operators				
Owners ¹⁸	—14.7	—3.6	—8.0	—3.8
Tenants	+31.8	+5.3	+15.6	+8.3
Farm acres				
Deedholders ¹⁹ .....	.....	—11.5	.....	.....
Lessees ²⁰ .....	.....	+12.8	.....	.....

¹⁷Based on data, above, p. 45.

¹⁸Includes owners proper, part owners and managers.

¹⁹Includes land operated under deed by part owners and by owners proper.

²⁰Includes land operated under lease by part owners and by tenants.

1900, and 41.4 in 1910, a relative increase of 5.3 per cent. The statistics based on acreage indicate that the percentage of tenancy in 1900 was 45.2, and in 1910, 51.0. Basing the statistics on acreage raises the percentage of tenancy for 1900 by over one-fourth, that of 1910 by nearly one-fourth, and multiplies the rate of increase in tenancy between 1900 and 1910 by 2.4.

The farms of tenants increased 11.2 per cent in size and 0.6 in number between 1900 and 1910, embracing 38.63 per cent of the farm acreage in 1900 and 43.59 per cent in 1910. The farms of part owners increased in number from 34,375 in 1900 to 37,807 in 1910, or 10 per cent. The hired acreage in the average partly-owned farm in 1900 was 62.99 and in 1910, 63.86, an increase of 1.4 per cent during the decade. The part owners hired 6.6 per cent of the farm land of the state in 1900 and 7.4 per cent in 1910, a relative increase of one-eighth. The percentage of the farm acreage owned by part owners increased from 8.4 to 9.7 between 1900 and 1910, while the percentage owned by owners proper fell from 45.0 to 37.5. Although the farms of owners proper were below the average in size in 1900, having but 118.9 acres on the average, they lost 5.1 acres per farm between 1900 and 1910.²¹

The increase in tenancy during the last decade was due in large measure to the growth in the average size of the areas rented by tenants and part owners, accompanied by a falling off in the size of the areas operated by the owners.

STATISTICS OF FARM TENURE BY COUNTIES

A map showing by dots the number of farms operated by tenants in the United States in 1910²² reveals the fact that the density of tenant farms in Illinois is greater than in any other area of equal size which does not include territory north of Tennessee or east of the line bisecting the states from North Dakota to Texas. Within the boundaries of Illinois the tenant farms seem to be pretty uniformly distributed, except for the territory between the Kaskaskia and Wabash rivers. A tendency towards clusters is found around East St. Louis and Chicago, while the density of tenants seems to be somewhat greater in the area between those two cities.

Another map showing by shaded areas the percentage of farms operated by tenants in every county in the United States is published by the United States census.²³ Naturally such a

²¹See below, p. 87.

²²Census, 1910, V, second map following 98.

map shows much less uniformity than the map employing the dot system. This is due to differences in the size of farms in various sections. The states whose appearance is most different in the two maps are, perhaps, Oklahoma, Iowa, and Illinois. In each of these states differences in the percentage of tenant farms from one section to another are very striking.

To trace the sectional differences in the percentage of tenant farms in Illinois a series of maps is presented herewith.²⁴

In 1880 the percentage of Illinois farms operated by tenants was 31.38. Only one county, Logan, had a percentage greater than 50. In Edwards county the percentage was 14.5. Of the remaining 100 counties, 50 had percentages between 25.0 and 35.0. These were located largely in the Northern and Western parts of the state. The 28 counties having percentages above 35.0 were clustered in the Central part of the state and in the old "American bottom" district.²⁵ The counties having percentages below 25 were confined to the Southern part of the state.

In 1890 the percentage of tenant farms in the state was 34.00. Ford county took the lead with a percentage of 53.7. Edwards county had the lowest percentage, 16.0. There were 45 counties having more than 35.0 per cent of their farms operated by tenants, against 28 counties in 1880. The counties with the highest percentages were in the East Central part of the state. Southern counties showed little change from the small percentages they had ten years before.

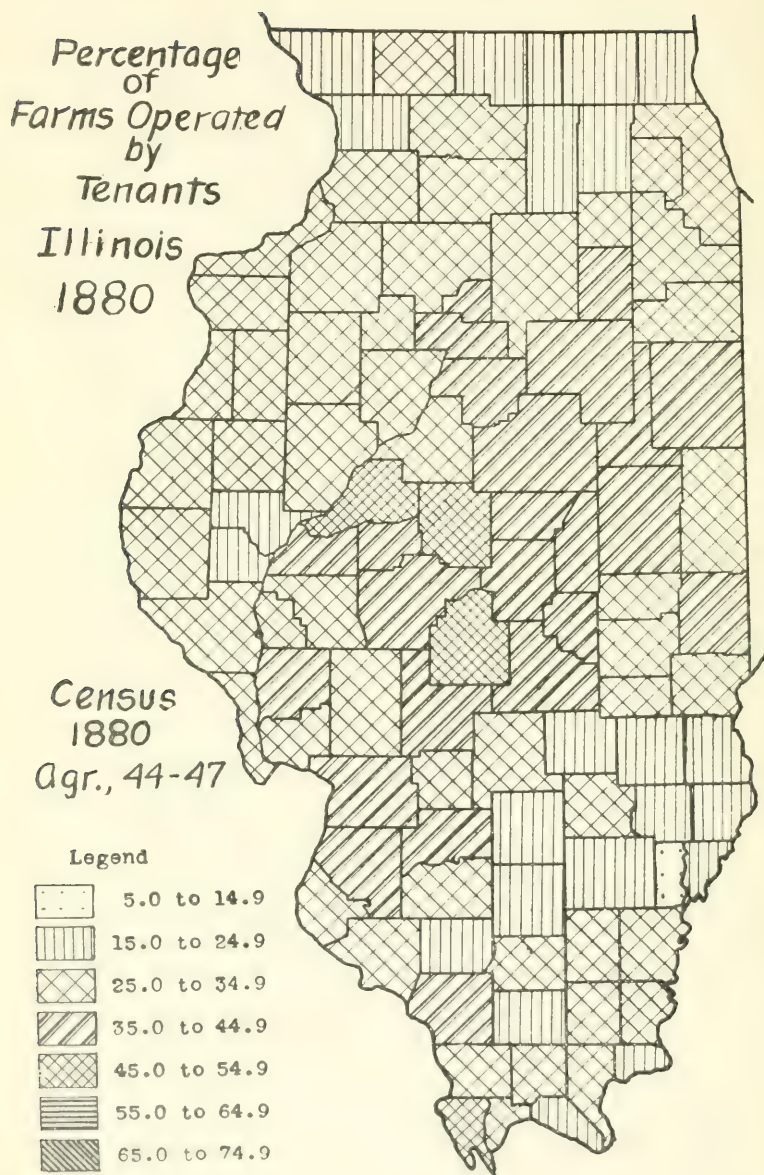
In 1900 the percentage of farms operated by tenants was 39.26. There were 68 counties having more than 35.0 per cent of their farms operated by tenants, and of these 26 had percentages exceeding 45.0. These counties were located in the East Central part of the state. The "Military tract"²⁶ underwent the most phenomenal increase in tenancy of any section of the state during this decade of remarkable growth in tenancy.

²³*Ibid.*, following 106.

²⁴See below, pp. 50-58, *passim*.

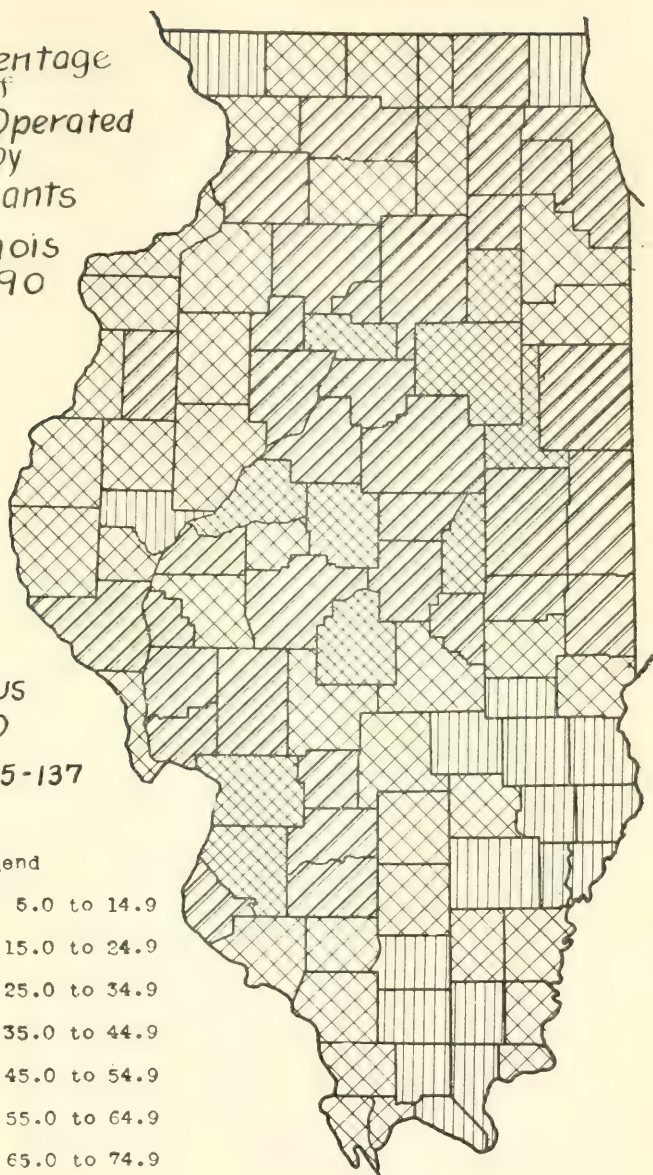
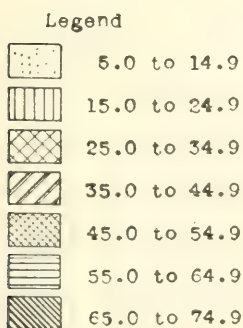
²⁵Around East St. Louis.

²⁶The strip between the Illinois and Mississippi rivers.



Percentage
of
Farms Operated
by
Tenants
Illinois
1890

Census
1890
Agr., 135-137



In 1910 the percentage of farms under tenant cultivation was 41.44. There were 41 counties with percentages exceeding 45.0. Twelve of the counties had percentages exceeding 55.0. By 1910 percentages of tenancy exceeding 45.0 had appeared in many of the counties between the Illinois and Mississippi rivers. Low percentages characterized the counties bordering the Mississippi river as far south as the old American bottoms, and followed the Illinois river over half the distance to its source. In Southern Illinois, however, the percentages in the counties bordering the Mississippi, Ohio and Wabash rivers was somewhat larger than the percentages prevailing in the interior counties. The lowest percentage was that of Edwards county, 20.1, while the highest was that of Ford, 66.7. Ford, Logan, and Grundy counties were the only counties in the United States north of the latitude of Cairo, Illinois, whose percentage of tenant farms was above 60.0.

To ascertain the relative growth of tenant farming in Illinois from 1880 to 1910 we may employ as a basis the number of tenants among each one thousand operators. In five counties, led by DeKalb with a percentage of 122.7, the increase in the relative number of tenant farms was over 100 per cent. There were five counties²⁷ in which there was a decline in the relative number of tenant farms during the period considered. The percentage of decline was largest in the case of Pope county. In Pope county, however, the percentage of decline was only 22.5. Through the Central part of the state the increase was between 25 and 50 per cent. In general, it may be said that the relative number of tenant farms was stationary in Southern Illinois, increased by one-fourth to one-half in Central Illinois, and doubled in Northern Illinois during the generation, 1880 to 1910.

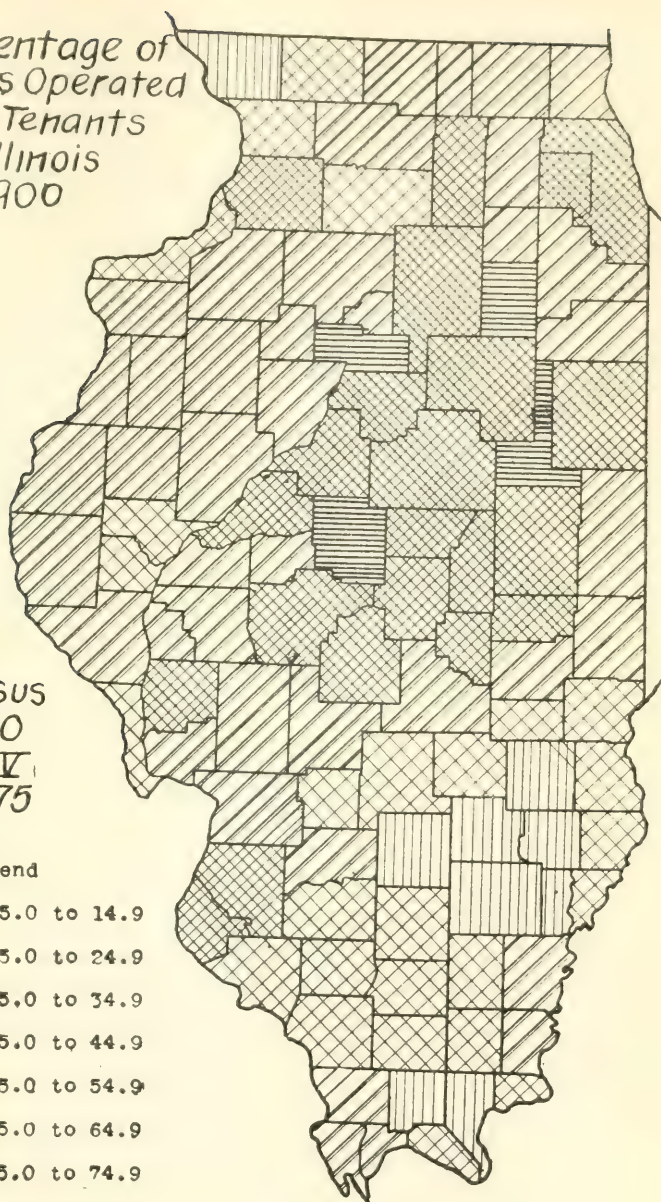
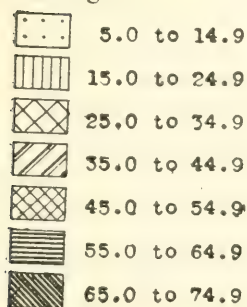
The following table shows the number of counties in each grade when classified according to the percentage of farms operated by tenants.

²⁷All of these counties are located in Southern Illinois.

*Percentage of
Farms Operated
by Tenants
Illinois
1900*

*Census
1900
Vol V
73, 75*

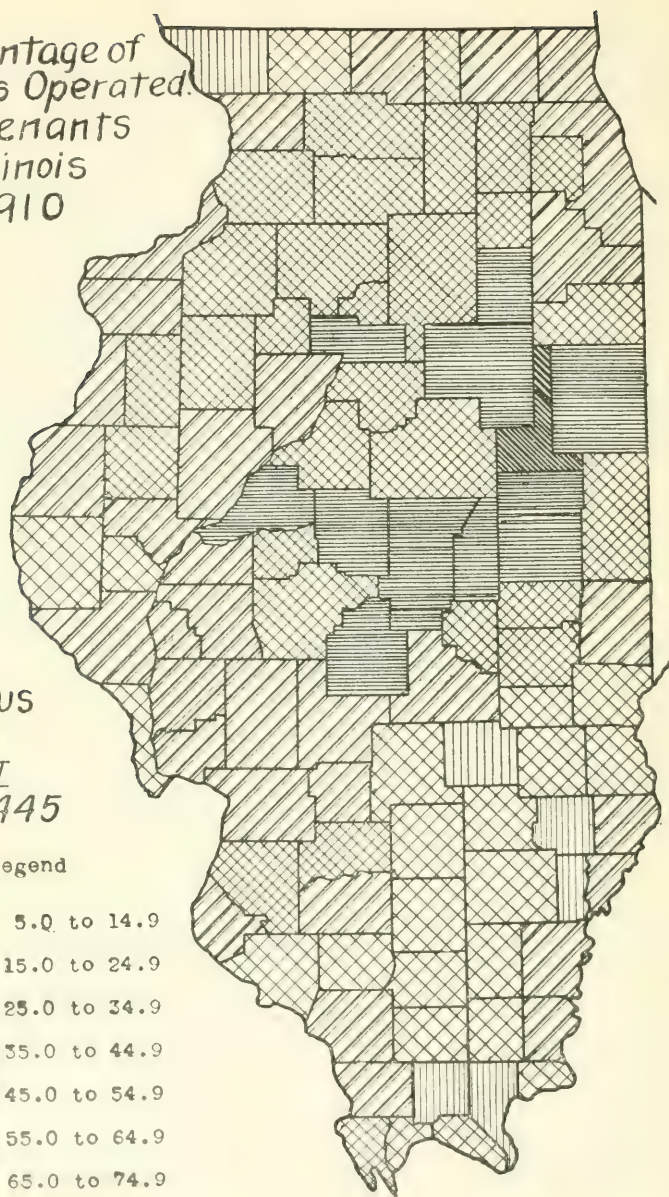
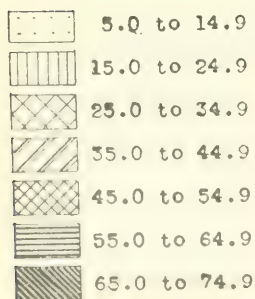
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Percentage of
Farms Operated
by Tenants
Illinois
1910

Census
1910
Vol VI
436-445

Legend



CLASSIFICATION OF COUNTIES ACCORDING TO THE PERCENTAGE OF FARMS OPERATED BY TENANTS, AND NET CHANGE IN THE NUMBER OF COUNTIES IN EACH PERCENTAGE GROUP, ILLINOIS, 1880-1910.

Percentage range	Date				Net change, 1910 compared with 1880	
	1910	1900	1890	1880	Direction	Number
65.0—69.9	1	....	....	....	Inc.	1
60.0—64.9	2	1	....	....	Inc.	2
55.0—59.9	9	3	....	....	Inc.	9
50.0—54.9	7	9	2	1	Inc.	6
45.0—49.9	22	13	8	3	Inc.	19
40.0—44.9	17	25	13	5	Inc.	12
35.0—39.9	16	17	22	19	Dec.	3
30.0—34.9	11	13	20	22	Dec.	11
25.0—29.9	11	12	20	28	Dec.	17
20.0—24.9	6	9	11	19	Dec.	13
15.0—19.9	....	....	6	4	Dec.	4
10.0—14.9	....	....	....	1	Dec.	1

The table shows the positiveness with which the percentage of tenant farms has increased in Illinois counties. The counties having percentages below 40.0 have been growing fewer and fewer in number, while the number of counties in each grade above 40.0 has undergone a regular increase.

The percentages characterizing the Illinois county with least tenancy at the four census dates, 1880 to 1910, were 14.5, 16.0, 21.2 and 20.1 respectively.²⁸ The highest percentages similarly reported were 50.4, 53.7, 62.9 and 66.9, respectively.²⁹ The lowest percentage was 5.6 points higher in 1910 than in 1880, and the highest percentage had risen 16.5 points.

All indications go to show, therefore, that while the rate of progress in the direction of farm tenancy has been slow in the case of some counties of Illinois, it has been very rapid in the case of some other counties. The movement away from uniformity in Illinois has been much greater than is indicated by the census map showing the distribution of tenants by number.

²⁸Edwards county, in each case.

²⁹Logan county in 1880, and Ford county in 1890, 1900 and 1910.

STATISTICS OF LAND TENURE BY COUNTIES³⁰

The absence of county data on the acreage hired and owned by part owners in 1900 makes it impossible to present maps showing the percentage of farm land operated under the various forms of tenure at that date. By courtesy of the census bureau, however, the thirteenth census data on renting and owning by part owners in Illinois have been received by private communication for 99 of the 102 counties in the state. This makes it possible to present here the data on land tenure for 1910.

Comparing the map showing the percentage of farm land operated by tenants in 1910 with the map showing the percentage of farms operated by tenants, it appears that in Southern Illinois the tenants operated farms averaging smaller than those operated under other forms of tenure. In Central Illinois east of the Illinois river, and especially in the interior counties of Northern Illinois the tenant farms were larger than those of other tenures. In the Military tract tenant farms were about the same in size as other farms. As a whole, the state had 43.59 percent of its farm land operated by tenants whereas these constituted 41.44 per cent of the farm operators.

The farms operated by managers were 0.96 per cent of all farms in 1910, but averaged 234.04 acres. The percentage of land managed was 1.72. In Piatt county, managers cultivated 7.64 per cent of the land, while in Wabash county they controlled but 0.18 per cent. Little can be said of the sectional variation except that the distribution of managed land is highly sporadic. However prevalent managing may be west of the Mississippi,³¹ its prominence in Illinois in 1910 cannot be regarded as important.

The percentage of farm land operated by part owners in 1910 was 17.15. The farms of part owners contained an average of 147.5 acres against the general average of 129.1 acres.³² In two counties part owners cultivated over 35 per cent of the farm land, Edwards county leading with a percentage of 39.1. In DuPage county, in the Northern part of the state, only 3.0 per cent of the farm land was operated by part owners. In a

³⁰"Land" tenure may be conveniently used when we think in terms of acreage, and "farm" tenure when we think in terms of farms or of farmers.

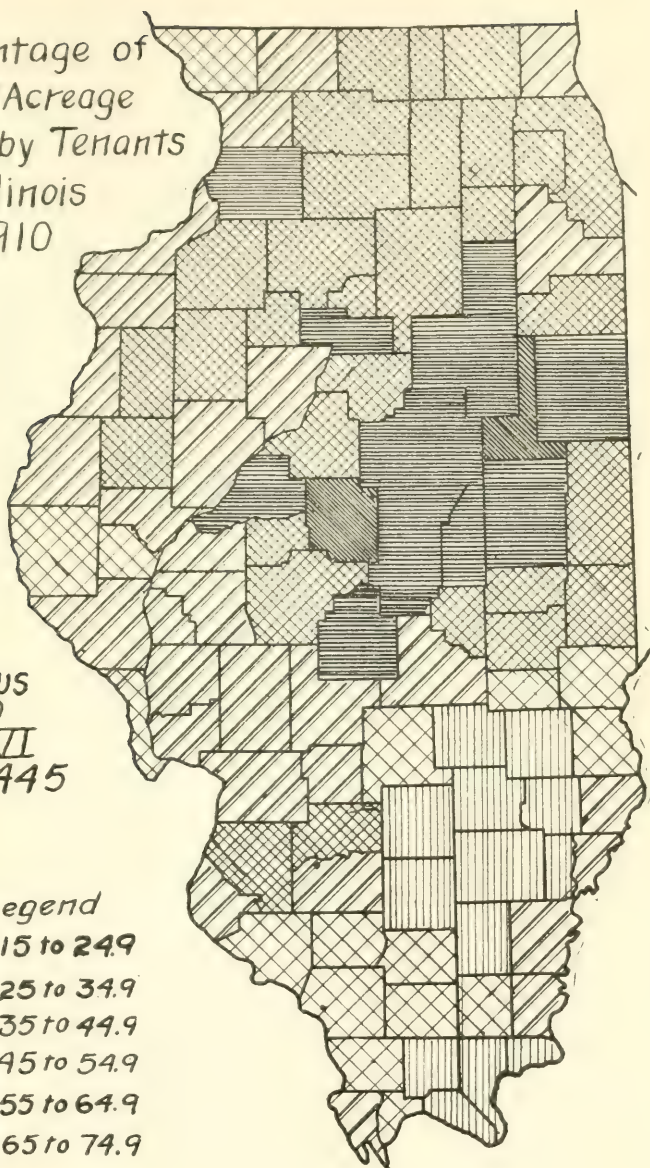
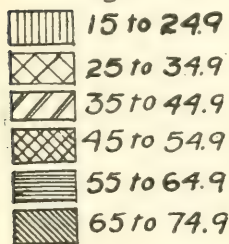
³¹See above, pp. 14, 16, 17.

³²See below, p. 87.

Percentage of
Farm Acreage
Hired by Tenants
Illinois
1910

Census
1910
Vol. VI
426-445

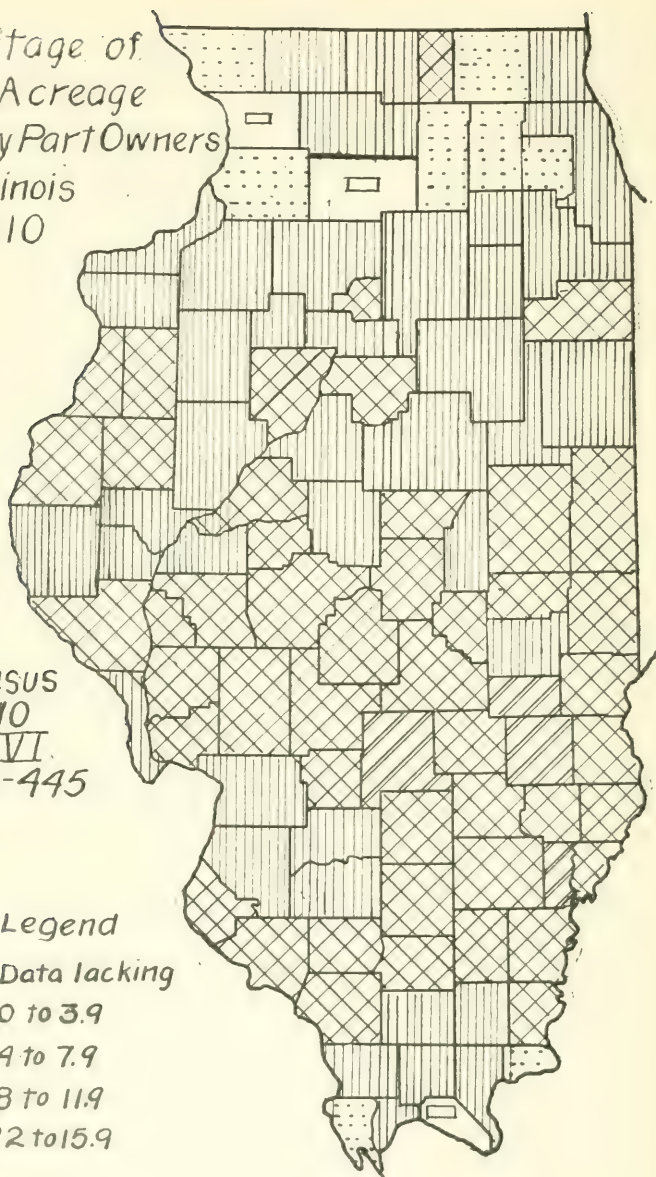
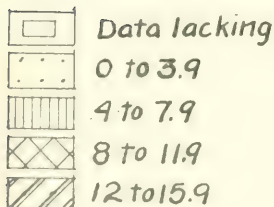
Legend



*Percentage of
Farm Acreage
Hired by Part Owners
Illinois
1910*

*Census
1910
Vol. VI
426-445*

Legend



general way it may be said that the control of part owners over Illinois farming is greatest in Southern Illinois, average in Central Illinois, and least in Northern Illinois.

The percentage of the "partly owned" land that was hired in 1910 varied from 30.2 in the case of Hardin county to 55.2 in Vermilion county. The counties in which over 50.0 per cent of the land in farms of part owners was hired were in the East Central part of the state. Those in which less than 40.0 per cent of the land in partly owned farms was rented were in the Southern part of the state. The average for the state was 44.7 per cent.

A map is presented showing the percentage of the total farm land in each of 99 counties that was leased by part owners in 1910. The smallest percentage was 1.6, found in DuPage and Kane counties, and the largest percentage was that of Edwards county, 14.8. The counties in which over 9.0 per cent of the farm land was hired by part owners were confined almost entirely to the Southeastern quarter of the state. Very low percentages occurred in the extreme Southern and Northern ends of the state. The average for the state was 7.43 per cent.

Another map shows the percentage of all land in the 99 counties hired by tenants and by part owners in 1910. The county with the smallest percentage of its farm land operated under lease was Hardin, the percentage being 21.6. In Jo Daviess³³ and in Pope and Johnson counties³⁴ the percentages were less than 30.0³⁵. In Ford county 75.4 and in Logan county 72.4 per cent of the farm land was hired. Nineteen counties had over 60.0 per cent of their farm land hired. These counties, with the exception of Whiteside, lay in the Central and East Central part of the state.

The land to which part owners held deeds constituted 9.73 per cent of the total farm acreage of the state. In DuPage county the percentage of the farm land owned by part owners was but 1.4, while in Jasper county it was 21.8. The percentages throughout Southern Illinois, except St. Clair county and the extreme Southern tip, were above the state average. In a rough way it may be said that the amount of land owned by part owners decreases the farther north one goes in the state.

Owners proper operated 37.54 per cent of the land in Illinois

³³In the Northwest corner of the state.

³⁴In the Southern tip of the state.

³⁵Massac county would probably come in the same class had we the data for it.

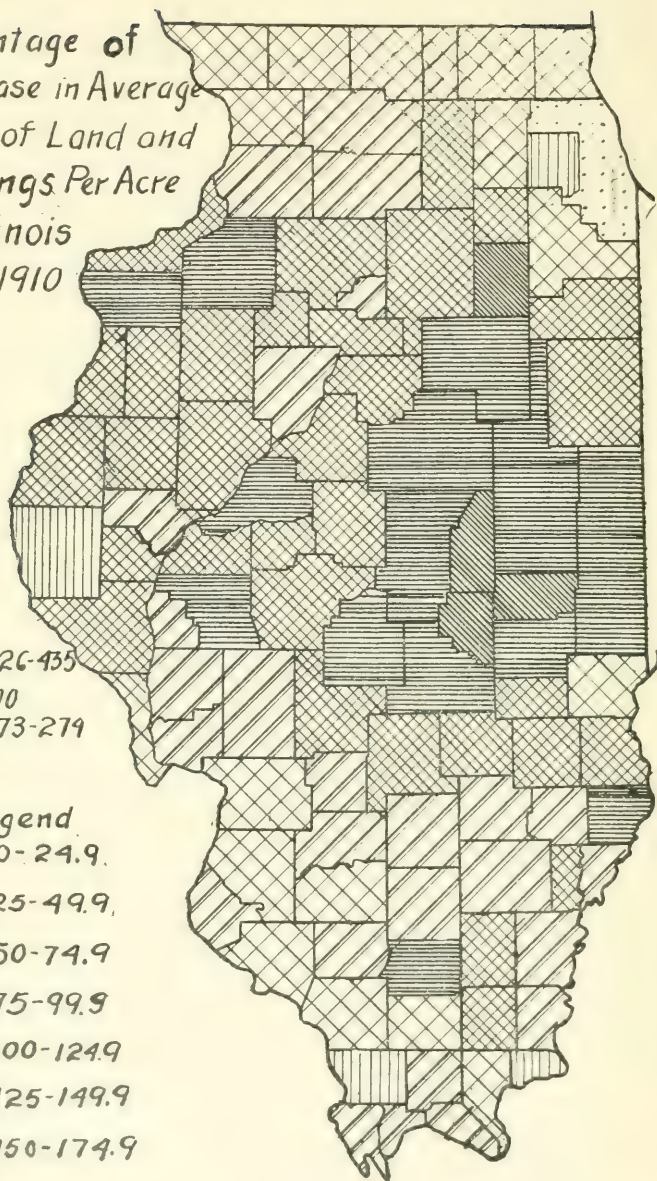
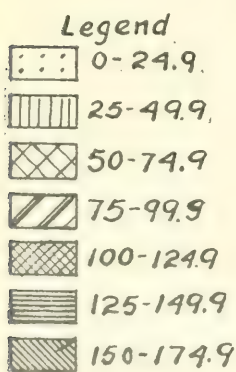
*Percentage of
Increase in Average
Value of Land and
Buildings Per Acre
Illinois
1900-1910*

*Census
1910*

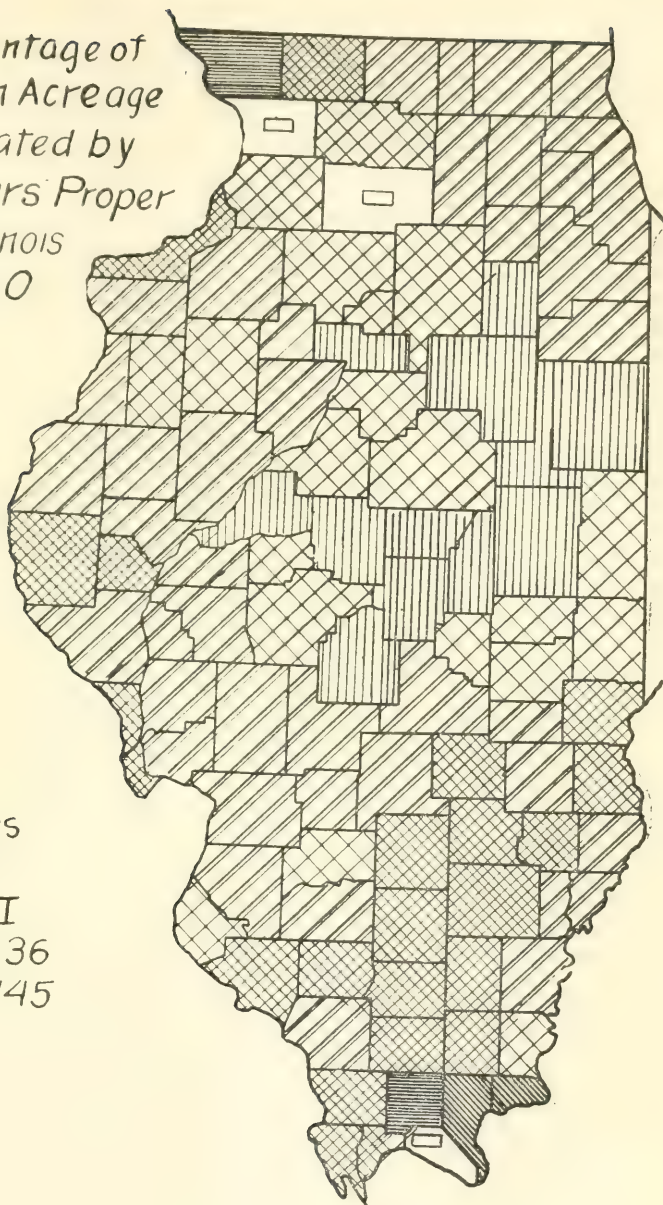
Vol VI 426-435

1900

Vol V 273-279



*Percentage of
Farm Acreage
Operated by
Owners Proper
Illinois
1910*



*Census
1910
Vol VI
425-436
436-445*

in 1910. The percentage in Ford county was the least, 18.4, while the percentage in Hardin county was the largest, 73.2. In 13 counties the owners proper operated less than 25.0 per cent of the farm land, these being East Central Illinois counties.

In 13 counties, located mainly in East Central Illinois, the proportion of land operated by the owners was less than 33.3 per cent. In 5 of these counties the percentage was under 30.0 and in one county, Ford, the percentage was 23.7. Only three or four counties had percentages exceeding 70.0. These were Hardin, 77.8; Pope, 75.9; Johnson, 74.0; and possibly Massac. The average for the state was 47.28 per cent.

It is evident that the leasing of land has a very prominent place in Illinois agriculture, and that there are marked sectional variations.

THE SECTIONAL ASPECTS OF LAND TENURE IN ILLINOIS

The sectional differences in land leasing in Illinois can be best understood by tracing the sectional variations in other features of agriculture in the state.³⁶

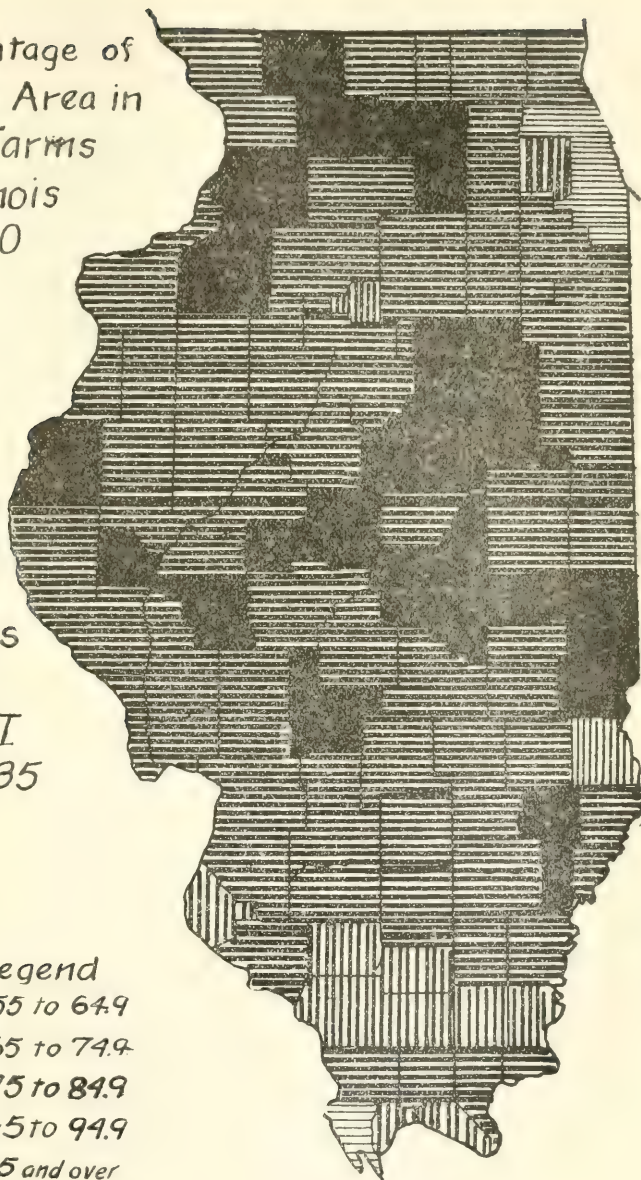
In 1880 it appears that the counties with the highest percentage of land area in farms, of farm land improved, of improved land in cereals, of improved land in corn, and the counties with the highest average number of acres per farm, and the highest average value of products per acre were located in the Central and Northern parts of the state. The figures reported for the Southern Illinois counties were smaller than those of the other counties in the case of each subject, or basis of comparison mentioned. In like manner the land was lowest in price in Southern Illinois, but the counties having the highest priced lands in 1880 were located in the Northwestern part of the state.

³⁶The typewritten copy of this thesis on file in the library of the University of Illinois contains county outline maps showing data by counties on each of the following items:

(1) The percentage of land area in farms, 1880 and 1910. (2) The percentage of farm land improved, 1880 and 1910. (3) The percentage of improved farm acreage devoted to the production of all cereals, and of corn, 1880, 1890, 1900, and 1910. (4) The average number of acres per farm, 1880, 1890, 1900, and 1910. (5) The average value of products per acre, 1879, 1889, and 1899. (6) The average value of land and buildings per acre, 1880, 1890, 1900, and 1910. (7) The percentage of increase in the average value of land and buildings per acre, 1880-1910, 1880-1900, and 1900-1910.

Percentage of
Land Area in
Farms
Illinois
1910

Census
1910
Vol. VI
426-435



The data for 1890 and 1900 show the same sectional differences, with a tendency for the sectional differences to widen except in the case of the percentages of land area in farms and of farm area improved.

In 1910 the percentages of land area in farms and of farm land improved were much more nearly uniform throughout the state than at previous census dates. This is because of the fact that there has been an increasing demand for land in all parts of the state. That fact is attested by the higher value of land in 1910 as compared with previous dates. There was a concentration on the production of cereals in the Central counties. This was doubtless in response to the higher prices paid for cereal products. The result of the changes in prices and of the redistribution of productions was to increase the differences between sections in the value of products per acre.³⁷ The sectional differences in the value of land and buildings per acre were greater than those in any of the other features, due in large part to the fact that the relative increase in the value of land and buildings per acre was greatest in the districts where highest prices had prevailed in 1900 and 1890. A similar development took place in the matter of average farm acreages. In the Southern part of the state farms changed little in size from 1880 to 1910, while in the counties of the Central part of the state a

³⁷The unreliability of these statistics and the fact that they represent the gross values of products make it necessary to be cautious in their use.

Data were gathered in 1880 and 1890 for products raised, the part fed to livestock on the farm being given an estimated value and included. In 1900 the data excluded the products fed to livestock. This makes comparisons with previous census data of doubtful value. Even for the same census comparisons between counties in which livestock and dairying were practised and other counties must lose most of their significance. The census of 1910 gives up any attempt "to compute or even to estimate approximately the total value of farm products" and proceeds to enumerate the "numerous difficulties which stand in the way of obtaining a total which would be at once comprehensive, free from duplication and confined exclusively to the products of a definite period of time." Values of the different productions were reported separately in 1910, however, and an inspection of these returns bears out the statement in the text to which this footnote appends.

The values are the so-called "farm values", rather than the values of the products delivered at the market. The data at each census are for the preceding year, so far as productions are concerned, but the acres of land in farms and the prices are those of the current census year.

considerable increase took place in the size of the average farm.

The development during the last generation can be better understood, perhaps, by referring to the distribution of timber in 1880. On some maps designed to show the density of timber in various parts of the state is what may be called the "ten cords" line. This line divides the territory in which there were more than ten cords of wood per acre from that in which the cordage per acre was less than ten.³⁸ The latter may be regarded roughly as the original prairie district of the state.³⁹

In nearly every comparison between recent and earlier census data the later reports show developments to be concentrating in the old prairie district. The most striking case is that of land values. The highest values in 1880 were in the territory north and west of the Illinois river. By 1910 the district of highest land prices had become centered in the East Central part of the state and the counties in which the value of land and buildings per acres exceeded 125 dollars were, almost without exception, those whose areas constituted the original prairie.

When the maps illustrating tenancy are compared with those showing the sectional aspects in the other features of agriculture, the resemblance is striking. The counties with highest percentages of tenancy at each date were, for the most part, the prairie counties. In 1910, especially, the district in which over 45 per cent of the farms were operated by tenants, which is nearly the same as that in which over 50 per cent of the land was leased, was defined almost exactly by the line dividing the original prairie and timber regions.

The sectional association of tenancy with the values of products, with values of land and buildings, and with various acreages of farms is exhibited in the table on the next page. The counties were divided into six groups of seventeen counties each, independently for each census. Group I included the seventeen counties that stood highest in the percentages of tenant farms at the census date in question, group II included those ranking from eighteenth to thirty-fourth, and so on for the other four groups.

In all cases the range of difference between the highest and lowest county group averages was greater at each succeeding census date. This increase in sectional differences seems to have affected not only the items given here, but also items of produc-

³⁸Census, 1880, *Forest Trees of North America*, plate 7.

³⁹Pooley, E. V., *The Settlement of Illinois from 1830 to 1850*, 308.

THE VALUE OF PRODUCTS PER ACRE, THE VALUE OF LAND AND BUILDINGS PER ACRE, AND THE AVERAGE NUMBER OF ACRES PER FARM FOR ILLINOIS COUNTIES ARRANGED INTO GROUPS ACCORDING TO THE PERCENTAGE OF FARMS OPERATED BY TENANTS IN THE INDIVIDUAL COUNTIES; AND THE RANK OF THE COUNTY GROUPS FOR EACH ITEM.⁴⁰

County group	Data and rank of groups based thereon					
	I	II	III	IV	V	VI
Average value per acre (dollars). 1910 ⁴¹	..... (1)	..... (2)	..... (3)	..... (4)	..... (5)	..... (6)
Products ⁴¹						
1900	10.20 (1)	9.74 (2)	7.92 (3)	7.84 (4)	5.99 (5)	4.68 (6)
1890	7.23 (1)	6.79 (2)	6.59 (3)	5.82 (4)	4.63 (5)	3.97 (6)
1880	7.06 (1)	7.02 (2)	6.89 (3)	6.08 (4)	4.96 (6)	5.94 (5)
Land and buildings						
1910	143.20 (1)	118.10 (2)	103.30 (3)	80.80 (4)	51.40 (5)	39.10 (6)
1900	63.30 (1)	61.40 (2)	44.10 (4)	44.70 (3)	38.80 (5)	19.30 (6)
1890	47.80 (2)	52.10 (1)	43.24 (3)	40.90 (4)	28.43 (5)	23.17 (6)
1880	31.10 (3)	34.94 (2)	38.23 (1)	28.45 (5)	25.68 (6)	29.75 (4)
Average number of acres per farm						
1910	160.5 (1)	146.3 (2)	125.0 (4)	131.2 (3)	110.7 (5)	100.5 (6)
1900	148.6 (1)	129.5 (3)	134.7 (2)	123.9 (4)	112.0 (5)	96.4 (6)
1890	136.5 (2)	138.5 (1)	135.6 (3)	128.0 (4)	115.0 (5)	104.0 (6)
1880	122.1 (5)	132.2 (1)	114.0 (2)	117.5 (6)	123.8 (3)	122.3 (4)

⁴⁰Based on Census, 1910, VI, 436-455; 1900, V, 73, 75, 273, 274; 1890, IV, 73, 75, 273, 274.

Agriculture, 135, 137, 204-206; and 1880, 44-47, III, 112.

⁴¹The products are those of the year preceding the census.

⁴²Comparable data discontinued, other data afford basis for estimates of ranking.

tion,—nearly everything, in fact, except the percentage of land area in farms, the percentage of farm area improved, and the percentage of farm area in woodland. The application of capital and labor seems to have produced greater sectional differentiation.

The tendency toward sectional concentration in the agriculture of Illinois doubtless results from the fact that farming has been carried on for increasingly larger market areas, and that the capacities of soil and situation for the production of certain staples have been revealed more and more clearly with the advance of time.

In the case of each of the three bases of comparison given in the table the sectional association with tenancy was closer at each succeeding census. In 1910 the parallelism was very close between tenancy and average values per acre of products and of land and buildings. The county groups III and IV (on the basis of tenancy) ranked fourth and third, respectively, in the average size of farms, but otherwise the sectional correspondence between tenancy and the size of farms was consistent. The same sectional correspondence obtained between tenancy and the percentage of land area in farms, and between tenancy and the percentage of improved land devoted to cereal and especially corn and oats production.

The fundamental reason for the increasing association of all the factors has been the influence of an increasing market demand for cereals, the production of which in Illinois was being carried on under a perfecting machine economy. This influence has been most felt in districts in which machinery could be most effectively employed and in which the natural fund of fertility enabled fertilizing costs to be almost entirely eliminated. The rich, level prairie has, therefore, responded with greater percentages of land area under cultivation, of farm area improved, of improved area in cereals, and with greater acreage per farm.

Tenancy has been a phase accompanying this movement, and has been related to the other factors.

Farm tenancy has been more or less prevalent in Illinois districts according as they have been producing a high or low value of products per acre. It would scarcely be urged that the association of tenancy with high acre values of products proves that tenancy was responsible for the higher productiveness of the land. "Productiveness" is a matter of gross values,

however, and not simply one of yields per acre. For that reason tenancy may have increased the gross values of products per acre by causing a larger portion of the land area to be devoted to the production of products the gross values per acre of which are high. On the other hand, the productiveness of the soil has done much to determine the proportion of the land operated under lease. The gross value of products per acre in different sections must be a fair index of the relative rents paid for equal areas in those sections. The higher the rents received by the landowners, the greater is the chance that the owners may feel free from the necessity of operating their land.

At this point, however, the size of farms and holdings⁴³ must be considered.

Differences in per-acre rentals do not afford alone a basis for explaining differences in the prevalence of tenant farming. The ability of many landowners to live without operating their farm land is contingent upon the amount of rent they receive. The number of acres from which they receive rent is often a more important consideration, therefore, than the rent per acre. The larger the average size of holdings the greater we may suppose the opportunity to be for landowners to rent their land out and live upon its rental income.

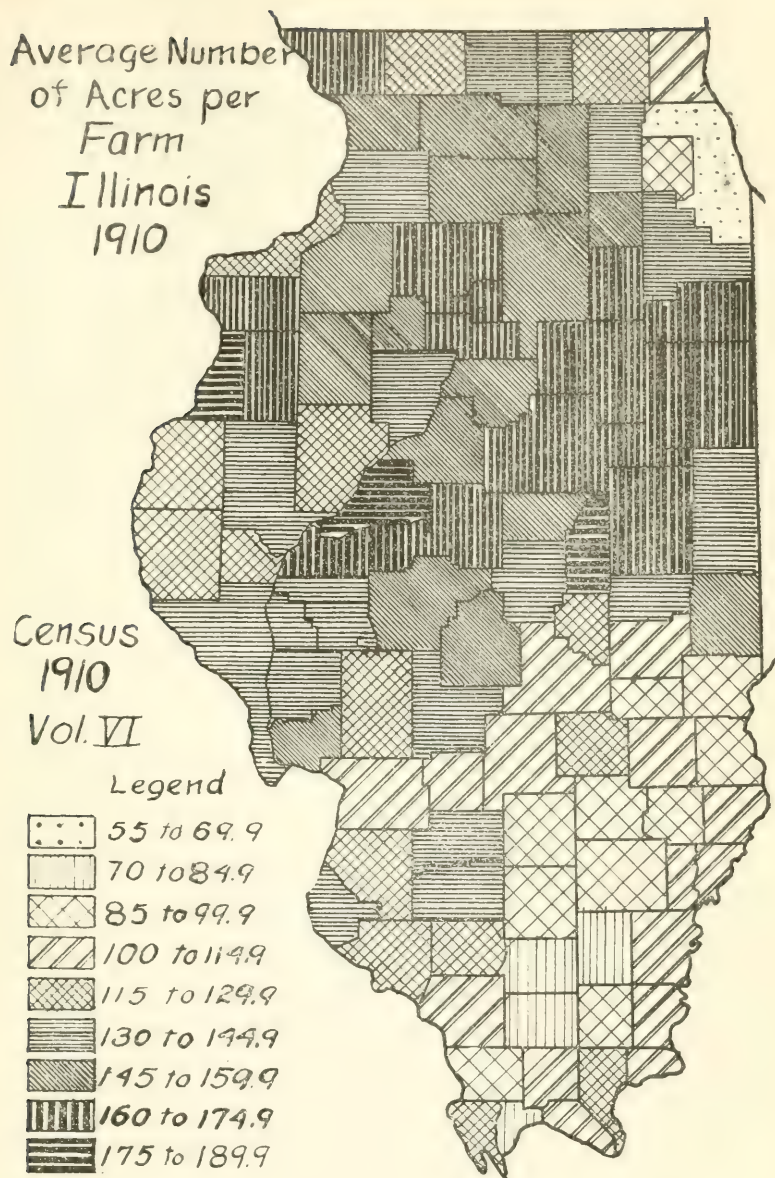
On the other hand, the prevalence of holdings too small to be operated except in connection with adjacent land may contribute to land renting.⁴⁴

It is probable that tenancy has, in turn, had an influence upon the size of farms. When an owner leases his land to tenants, he naturally tries to get the lay-out of land best adapted to tenant operation. Unless the economies of cultivation favor small farms, the owner will seek tenants who will operate in larger tracts. For the owner this cuts down the difficulty and expense of negotiation and supervision. Where the advantages of large-scale farming are effective, the better class of tenants are naturally attracted to opportunities for operating on a large scale.

In districts where the advantages of large-scale farming have been less pronounced there has been a smaller possibility for owners to amass large holdings. As a consequence fewer

⁴³Holdings may be understood to refer to all the farm property owned by a landlord; sometimes including several farms.

⁴⁴See above, p. 22.



of the farms in the districts where small holdings prevail are operated under lease.

Thus far in this division renting has been considered largely from the point of view of owners with land to rent. On the other hand, there are those who want to operate land, in most cases, no doubt, looking forward with hope for land ownership. To these persons the prices they must pay for land are of special importance.

It will be observed in the table above that sectional correspondence between land prices and values of products, while not close in 1880, came later to be more and more so. It is probable that, on account of its not yet having been adequately tilled, the open prairie land was not yet established as superior in value in 1880, for the highest land prices were at that time in the district north and west of the Illinois river. At the later dates, however, it is safe to say that the price of land is a fairly accurate index of its productiveness.

The sectional correspondence of land prices with tenant farming was not very close in 1880. The failure in this case need not be taken too seriously, however, because the average value of land and buildings differed little from section to section. At each succeeding census the sections were more distinctly differentiated from one another in this respect. As this change took place high percentages of tenancy and high prices of land, and small percentages of tenancy and low prices of land were more usually found in the same districts. The association was very close in 1910—closer, perhaps, than that of tenancy with any of the other phenomena with which comparisons are made here.

High land prices have been characteristic of the districts where the standard size of farms was especially large. As a consequence the investment necessary for the purchase of a farm of representative size in the districts of high prices has been much larger than in the districts of smaller farms and lower prices. Since the percentage of the value which can be covered by mortgage is smaller in the case of the higher priced land,⁴⁵ the demand for ready cash is greater than the ratio of the price to cheaper land would lead one to suppose. Ready cash, however,

⁴⁵Stewart, C. L., *An Analysis of Rural Banking Conditions in Illinois*, 14, 15.

and credit on which to get money, is what the tenant ordinarily lacks.

For the most part, the influence of timber has been expressed in our data in the reduced earning power of the land. It seems probable, however, that it has had an effect upon tenancy in a more direct manner. Timber offers attractions to many people because of the kind of life to which it is conducive. Hunting, fishing, and the more varied activities which characterize life where the function of woodsman and farmer are combined probably cause the owners of such land to have less desire to retire from their places.

The result of the study of sectional differences shows that a single index, such as the value of land per acre or per farm, cannot be regarded as sufficient for an explanation of sectional differences in tenure. Of all single factors given statistical expression in the census reports gross values of products per acre seem to have had the most complete sectional parallelism with tenancy in Illinois. Probably gross values of products per farm would afford a still better index of tenancy.

There remains to be made an inquiry into the historical changes in the features thus far considered, as it were, by decennial cross-sections of the state.

HISTORICAL TENDENCIES AND TENURE IN ILLINOIS.

From 1880 to 1910 the number per 1000 farms of farms operated by tenants increased 30.1 per cent, and of farms operated by owners, part owners and managers decreased 16.0 per cent.⁴⁶

The number of acres of improved land per 1000 acres of land area increased from 728 to 782, or 7.3 per cent, between 1880 and 1910. That the improved farm acreage should have changed less than the number of the operators is only to be expected. In so far as slowness of expansion in the improved farm acreage in Illinois is indicative of a similar condition throughout the country,⁴⁷ it may imply a greater cost of increasing the improved acreage beyond the dimensions attained in 1880. To the extent that such is the case, the relative scarcity of land compared with the general population may, through the rise in prices of products and of land, and through increasing competition for rented farms, have stimulated the practice of tenancy at the expense of operation by owners.

⁴⁶See above, p. 47.

⁴⁷See above, p. 29.

Improving land has probably affected its tenure. In 1880 there were 4,935,575 acres of woodland and forest in Illinois farms. By 1910 this was reduced to 3,147,879 acres.⁴⁸ Evidence is thus afforded of a tendency to clear the timber from the land.⁴⁹ Large quantities of land have been reclaimed by means of drainage projects, especially along the river courses. By increasing the value of the land the way was paved for renting it more successfully in the future. It is probable, however, that the individual farmers who cleared and drained their farms were not themselves inclined to rent them out to tenants.⁵⁰ The fact that their farms responded to their efforts to improve them, though simple in its psychology, is a significant one. The succeeding generation of owners, however, may not be so much attached to the land as their predecessors who improved it, and may find the growing of staple crops by their tenants as satisfactory to them as if the land had always been treeless or naturally drained.

A basis for comparing the changes in tenancy with the changes in some other agricultural phenomena is afforded in the next table.

⁴⁸Census, 1910, VI, 425, and 1880, Agriculture, 103.

⁴⁹The present wooded areas represent with fair accuracy the original forest of the state. About thirty per cent of the total area of Illinois in 1857 was given as woodland. By 1880 it appears that all of the woodland in farms added to all the land area not in farms could not have exceeded twenty-five per cent, while it is possible that the percentage of the total land area in timber did not then exceed fifteen. The forest area of the state in 1911 was estimated at between five and six per cent of the land area.

It seems that nearly half of the timberland existing in Illinois in 1857 was cleared during the twenty-three years preceding 1880, while two-thirds of the remainder was cleared during the thirty-one years following.

It is not probable that any great portion of the timber has been ruthlessly burned in order to use the space for agriculture. The market for hardwood timber, of the varieties found in both Northern and Southern Illinois, has been an open one, and many of the varieties native to Illinois were such as sold well. The more prevalent practice in deforestation seems to have been to cull the more salable timber, and to treat the cut-over timber as the owner's policy might dictate.

(See Hall and Ingalls, *Forest Conditions in Illinois*, 177, 180-242, *passim*).

⁵⁰Drainage has sometimes been carried on by "outside" capitalists, in whose case the element of personal attachment to the land would not ordinarily be strong. See histories of most river counties.

THE ABSOLUTE NUMBER OF, THE PERCENTAGE OF INCREASE OR DECREASE OVER THE PRECEDING CENSUS, AND THE PERCENTAGE OF THE INCREASE BETWEEN 1880 AND 1910 OCCURRING DURING EACH DECADE IN TENANTS PER THOUSAND OPERATORS, ACRES PER FARM, AND DOLLARS WORTH OF PRODUCTS AND OF LAND AND BUILDINGS PER ACRE, ILLINOIS, 1880-1910.⁵¹

	1910	1900	1890	1880
Number of				
Tenants per 1000 operators.....	414	393	340	314
Acres per farm.....	129.1	124.2	126.7	123.8
Average value per acre (in dollars)....				
Products of preceding year ⁵²	17.92	9.40	7.02	6.43
Land and buildings.....	108.32	53.84	41.41	31.87
Percentage of increase during the decade ending				
Tenants per 1000 operators.....	5.3	15.6	8.3	.....
Acres per farm.....	3.9	-2.0 ⁵³	2.3	.....
Average value per acre				
Products of preceding year.....	89.9	33.9	9.2	.....
Land and buildings.....	101.2	30.0	30.0	.....
Percentage of increase, 1880-1910, occurring during the decade end'g				
Tenants per 1000 operators.....	21.0	53.0	26.0	.....
Average value per acre				
Products of preceding year.....	72.9	21.7	5.4	.....
Land and buildings.....	71.3	16.3	12.5	.....

The table shows a trend toward larger figures in all the phenomena, much greater in the case of the values of products and of land and buildings than in the case of tenancy or the size of farms. The relative number of tenant farms increased most between 1890 and 1900, the decade during which the farms grew smaller on the average. This affords no contradiction, however, to the conclusion previously arrived at, that smaller farms are usually operated by the owners. A reduction in the size of farms may, moreover, be related to an increase in tenancy, because of a movement on the part of larger owners to cut down

⁵¹Census, 1910, VI, 426, 436, 446; 1900, V, 72, 148, 149, 273; 1890, Agriculture, 119, 204; and 1880, Agriculture, 28, 29, 111.

⁵²With 1880 as 100.0 index numbers for the succeeding census dates were calculated on the basis of the two American systems, with the following result: 1890, 86.3; 1900, 85.3; 1910, 100.9. The values before being placed on the tabular basis were 1890, \$6.06; 1900, \$8.02; and 1910, \$17.98. See above, p. 40, note 26.

⁵³Minus sign (—) indicates decrease.

the size of the farming units for the sake of greater efficiency in production.

The rise in the value of products per acre is, of course, by no means an accurate measure of the average profits per acre, and, therefore, we should expect to find the value of land and buildings subject to a different variation than that in the value of products. The difference, however, is not great, the value of products per acre increasing 171 per cent, and the value of land and buildings 241 per cent between 1880 and 1910. It is only fair to estimate that the money profits of farming an acre increased somewhere near 200 per cent.

The increase of tenancy was much slower than the rise in the value of products, the value of land and buildings, or, possibly, of the profits per acre. The decade of the most phenomenal increase in the value of products, land and buildings, and, presumably, profits, was the one of least relative increase in tenancy, and followed the decade of greatest relative increase in tenancy. It might seem, therefore, that the increase of tenancy may have influenced the other factors, as well as that the other factors influenced tenancy.

If we consider divisions within the state, the disagreement between the rate of advance in land prices and the rate of increase in tenancy is still more obvious. The increase in the price of an average acre in the East Central counties during the thirty-year period, 1880 to 1910, was from four to six fold. This was about twice as great as the increase that took place in the price of a similar area in Northern and Western Illinois and about three or four times as great as the corresponding increase in Southern Illinois.⁵⁴ The percentage of tenancy doubled in Northern Illinois, increased by half in Central Illinois, and remained practically stationary in Southern Illinois.

It appears, then, that in Illinois the price of land has been highest and has increased most where and when the percentage of tenancy was the highest, but that the percentage of tenancy has not increased most either when or where land prices were the highest, or when land prices were increasing most rapidly. In other words, land prices have been more consistent with and responsive to differences and changes in tenancy than tenancy has been to differences and changes in land prices.

To some extent rising land prices are an indication of enlarged incomes of farmers and their relation to land tenure

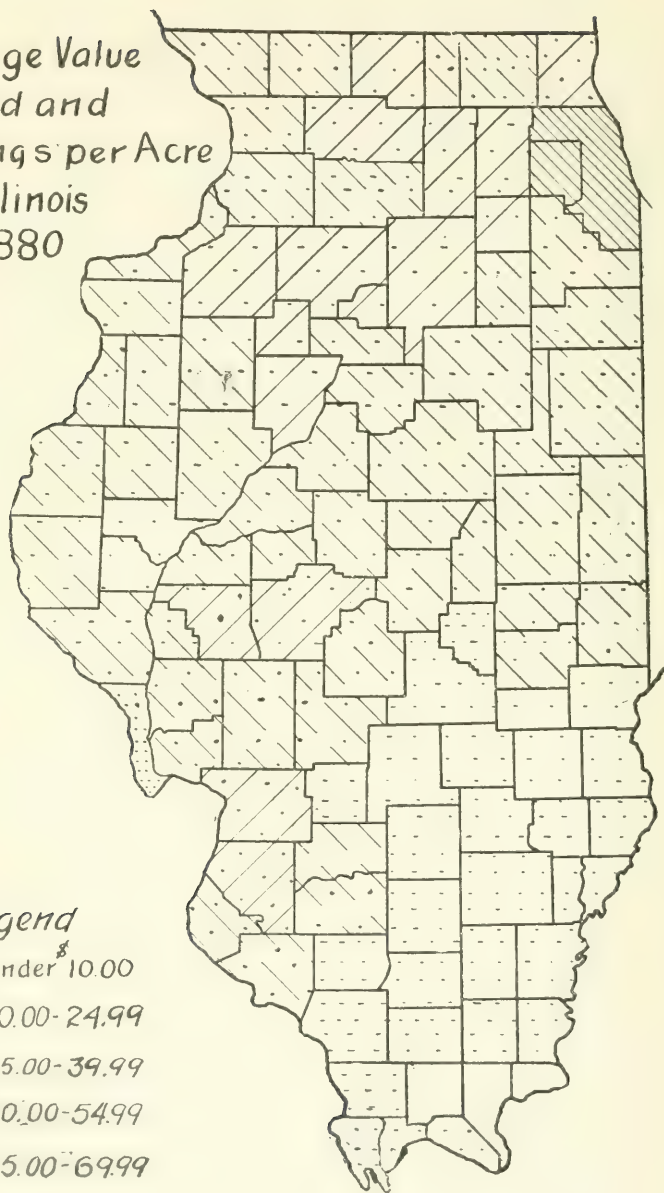
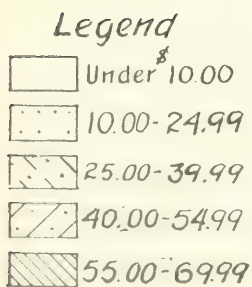
⁵⁴See below, p. 73, note 57.

is a complicated one for that reason. With rising profits from farming many operating owners who might otherwise have left and possibly sold their farms, are attracted by these greater profits to stay.⁵⁵ Thus the immediate effect of conditions causing higher land prices may be to prevent increase in tenancy. Likewise, the immediate effect of falling profits in farming may be to discourage owners from operating and possibly owning land. If these owners quit operating without selling their land, tenancy is increased. If the land is sold to tenants who proceed to operate, tenancy is decreased. So it is difficult to say whether the immediate effects of falling profits and low prices is to change the tenure of the land, although the ultimate effects are surely to decrease tenancy. The immediate accompaniment of rising land prices is likely to be an increase in tenancy, although the situation tends ultimately to become favorable to tenancy. The decade marked by the greatest increase in tenancy was that between 1900 and 1910. Agricultural profits were disappointing during the early part of the decade, but were picking up later. It is possible that many owners whose desire to quit farming was strengthened by the depression, found the effectiveness of their desire increased by the general improvement of agricultural conditions. Since 1900 the continued increase in the profits of farming has strengthened the attractiveness of the farm as a place for owners to make money by operating, but the economic freedom to leave the farm has also grown.

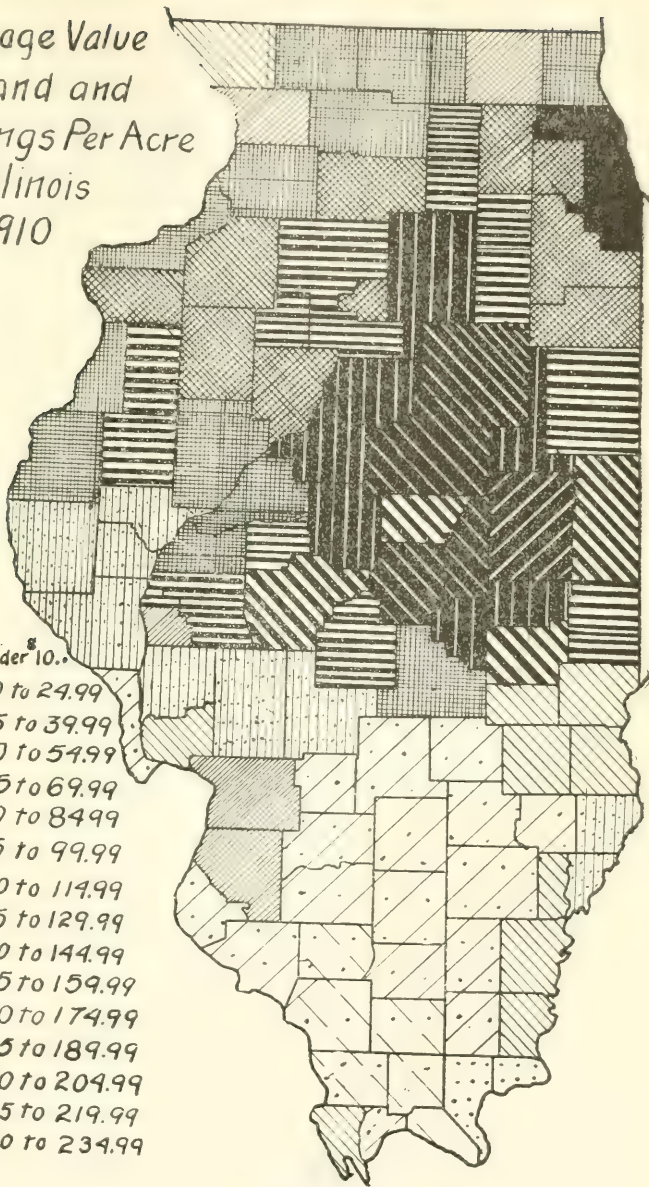
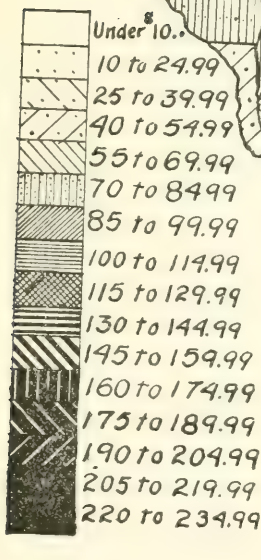
The influence of tenancy upon land prices arises in several ways. In the first place, the greater the number of available tenants for the renting of a piece of land, the greater is the value of an investment in such land to those who want to hold it without operating it. An investor can afford to bid higher for such land. In the second place, competition among tenants causes the rents paid to approach more nearly to the maximum. This naturally increases the value of the farm to the owner. In the third place, the higher the percentage of tenancy in the case of land devoted to the production of staple crops, and the more limited the aggregate acreage on which such crops can be profitably produced, the greater must be the "restraint of production" through the inefficiency of tenants, and the greater must be the effect of this restraint of production upon prices of products, profits of farming, and land values. Within its

⁵⁵See Taylor, H. C., *Introduction to the Study of Agricultural Economics*, 244-246.

Average Value
of Land and
Buildings per Acre
Illinois
1880



*Average Value
of Land and
Buildings Per Acre
Illinois
1910*



limits, inefficient production of crops, the area of production of which is naturally or economically restricted, must exert an influence similar to a crop shortage, which often results in a greater relative rise in prices per unit than the relative decline in aggregate production.⁵⁶ In so far as inefficient farming is promoted by tenants the effect may be somewhat to stimulate land prices through this "shortage" influence on production. As the areas of land suited to the production of staples become more definitely fixed, and as a greater demand is made by population for the products of those areas, the influence of inefficient production must become greater in this respect.

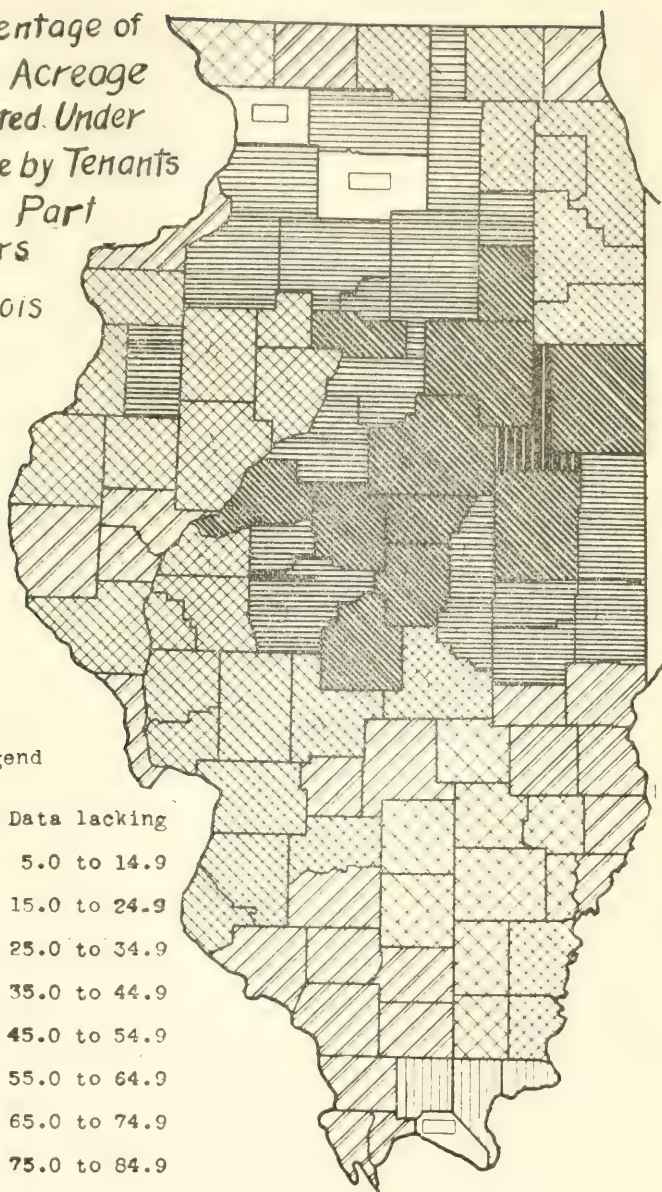
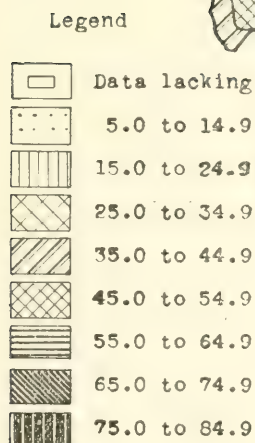
Still it is probably true that the rise of land prices has exerted a greater influence upon tenancy than tenancy has exerted upon the rise of land prices. Lands increasing in value so as to give a high annual rate of return on previous valuations tend to be capitalized at a more conservative rate of interest on the earning power than lands increasing in value more slowly. The tenant is not in a position to pay prices based on such a conservative interest rate. The rise in land prices has doubtless exerted this kind of influence most pronouncedly in the cereal-growing counties. In five counties in Central Illinois the average prices of land and buildings per acre increased over five-fold between 1880 and 1910,⁵⁷ as against an increase of about half as great for the state as a whole. Between 1900 and 1910 the relative increase in the value of land and buildings per acre was about twice as great in the East Central counties as in the Southern counties. The greater multiplying power of capital invested in the old prairie district has had much to do in increasing the size of holdings among land owners and of decreasing the chances for tenants to become owners in those districts.

The historical study shows that tenancy became more prevalent during the time when the state underwent an increase in (1) the percentage of land area improved, (2) the average number of acres per farm, and (3) the average value per acre of

⁵⁶Thompson, J. G., in *Publications of the American Economic Association*, IX, 68-70.

⁵⁷The percentage of increase in the value of land and buildings per acre in the five counties was as follows: Champaign, 551; Douglas, 514; Ford, 545; Moultrie, 596; and Piatt, 518. See Census, 1910, VI, 426-435; and 1880, Agriculture, III, 112.

*Percentage of
Farm Acreage
Operated Under
Lease by Tenants
and Part
Owners
Illinois*



products and of farm property. To a large extent tenancy has been increased and operation by owners diminished by the changes in these accompanying conditions. The rate of increase in tenancy has been augmented, no doubt, by the declining rate of increase in the farm area. The rate of increase in tenancy has been less than the increase in the value per acre of products and of land, and greater than the increase in the average size of farms.

Considering both sectional and historical aspects of tenancy growth in Illinois it seems to the writer that the extent, distribution and growth of land leasing is best explained in terms of the purchasing power of the rental income of the farms. The ability of an owner to retire from the operation of a farm is not to be measured solely in all cases by his income from that farm. He may have other income-bearing property, although, so far as farm property is concerned it is fair to say that the representative holding is one farm.⁵⁸ Again he may have income from some supplementary occupation, although this condition does not seem to characterize any great number of retired farmers. Landlords whose ownership of land is incidental to their careers in non-agricultural lines are somewhat numerous in some parts of the state. After allowing for these exceptions, it is probable that the purchasing power of the rental income of a farm is the main factor in determining whether the owner rents his place to a tenant or farms it himself.

The rental income of a farm is, of course, only the landlord's share of the economic rent of the place.

The tenant's portion of this annual surplus of returns from cultivation over costs is probably subject to less variation in absolute value than the landlord's portion. This means that the tenant's share in the surplus is probably smaller, relatively, when the surplus is large, and smaller, absolutely, when the surplus is small. The possibility a tenant has of saving is probably greater where the kind of farming operations he engages in is such as to place a premium upon diversified knowledge, operating capital and managerial ability.⁵⁹ Such a condition prevails more especially in Northern Illinois. In Central Illinois the farming method does not require such diversification of

⁵⁸See below, p. 76.

⁵⁹See Stewart, C. L., *An Analysis of Rural Banking Conditions in Illinois*, 19, 20.

technical knowledge, and competition for farms to rent is especially severe.⁶⁰ In Southern Illinois the surplus of operations and the acreage per farm are both small. In Southern Illinois tenancy has undergone very little change; in Central Illinois it has been highest and increasing somewhat; while in Northern Illinois it has been increasing at a rapid rate. In Northern Illinois the prosperity of tenants appears to have been responsible for their tendency to multiply in numbers, while in Southern Illinois the opportunity for tenants to rent seems to have been restricted. In the prairie district of the state tenancy has probably been stimulated by the higher rental income per owner, which has not only freed owners from the necessity of operation, but has caused the land to be capitalized at such a low rate that the tenants are not able profitably to own farms.

To summarize, it appears that the forms of tenure have been phases accompanying, limited by and modifying the conditions and changes in the agricultural economy of the state. The prevalence, sectional character and growth of farming by tenant operators is chiefly governed by the real value of the shares of the owners and tenants in the surplus of operation. Tenancy forms a sort of cumulative index of the effectiveness of the desire of the owners to escape the operation of their land, and of the ineffectiveness of the desire of tenants to become owners.

⁶⁰For several years nearly all news items in Chicago papers relating to cases where from 25 to 50 bids were made for farms offered for rent came from towns in Central Illinois.

CHAPTER IV

A DESCRIPTION OF FARM OPERATORS IN ILLINOIS

The farm operators of Illinois are, with few exceptions, heads of families residing on the farms. In 1890 the number of farm operators was 240,681, of whom 158,848, or 66.0 per cent, operated as owners.¹ At that date 252,953 farm families were reported, of whom 160,065, or 63.3 per cent, resided on farms owned by them.² In 1900 the number of farm operators was 264,151, of whom 158,503, or 60.0 per cent, were owners, 103,698 tenants, and 2,413 "owners and tenants". The number of farm families was 262,388,³ of whom 158,496, or 60.4 per cent, owned farms and 101,817 hired. The almost exact correspondence in these data affords sufficient evidence that in 1890 and 1900 the normal Illinois farm was a "family farm". There is no reason for believing that statistics taken later would show any change in this condition.

THE BASIS OF RENTING

The tenants of Illinois may be described more conveniently after dividing them into classes according to the basis on which they rent. The following table summarizes the census data on this point.

The period, 1880 to 1890, during which the total number of tenants underwent only a slight increase, was the decade of greatest readjustment of terms between the tenants and landlords. The number of share tenants declined 6,973, or 11.7 per cent, while the number of cash tenants increased 8,562, or 41.5 per cent. The percentage of all tenants renting on shares fell from 74.3 in 1880 to 64.3 in 1890. The tendency continued, though much abated, until 1900, when 63.2 per cent of the tenant farms were rented on shares. In 1910 there were 23,665 farms rented on a basis combining the share and cash principles. All these are here counted as share tenant farms, though it is probable

¹Census, 1900, V, lxix.

²The number of families residing on hired farms exceeded the number of farms operated by tenants by 11,055. It is possible that this was due to the reporting of some laborers hiring homes, or of some managers and owners occupying homes on land belonging to a tenant farm.

³Unknown, 2,075.

THE NUMBER OF ALL TENANTS, SHARE AND SHARE-CASH TENANTS, AND OF CASH AND UNSPECIFIED TENANTS, THE PERCENTAGE OF ALL TENANTS IN EACH GROUP, AND THE PERCENTAGE OF INCREASE OR DECREASE IN THE NUMBER IN EACH GROUP OVER THE PRECEDING CENSUS, ILLINOIS, 1880-1910.⁴

Census date	Total		Cash and unspecified		Share and share-cash		Percentage	
	Number	Inc.	Number	Inc.	Number	Inc.	Cash, etc.	Share, etc.
1910	104,379	0.7	37,163	—2.6 ⁵	67,216 ⁶	2.6	35.6	64.4
1900	103,698	26.7	38,173	30.8	65,525	24.5	36.8	63.2
1890	81,833	2.0	29,182	41.5	52,651	—11.7 ⁵	35.7	64.3
1880	80,244	.....	20,620	.....	59,624	.....	25.7	74.3

that a part of the farms rented in 1900 on the combined share and cash basis were then counted as cash tenant farms. To the extent that share-cash tenants were classified as cash tenants in 1900, less significance is to be attached to the decrease from 36.8 to 35.6 between 1900 and 1910 in the percentage of farms rented for cash.⁷

In 1880 there were only 6 counties in the state in which the percentage of tenants renting for cash exceeded 50. All of them were in the Northern division of the state. In 1890 there were 21 such counties, 13 in the Northern division and 8 in the Central division. In 1900 the number of counties in which cash renting predominated was 24, 19 being in the Northern and 5 in the Central part. In 1910 the number of such counties fell to 15, all of them being in Northern Illinois. In 1880 there were 48 counties in which the percentage of farms rented for cash was under 20, 27 were in Southern Illinois, 20 in Central and 1 in Northern Illinois. In 1890 the number of such counties was 33, in 1900, 35, and in 1910, 45. At the last date 36 of the counties

⁴Census, 1910, V, 124, and VI, 438.

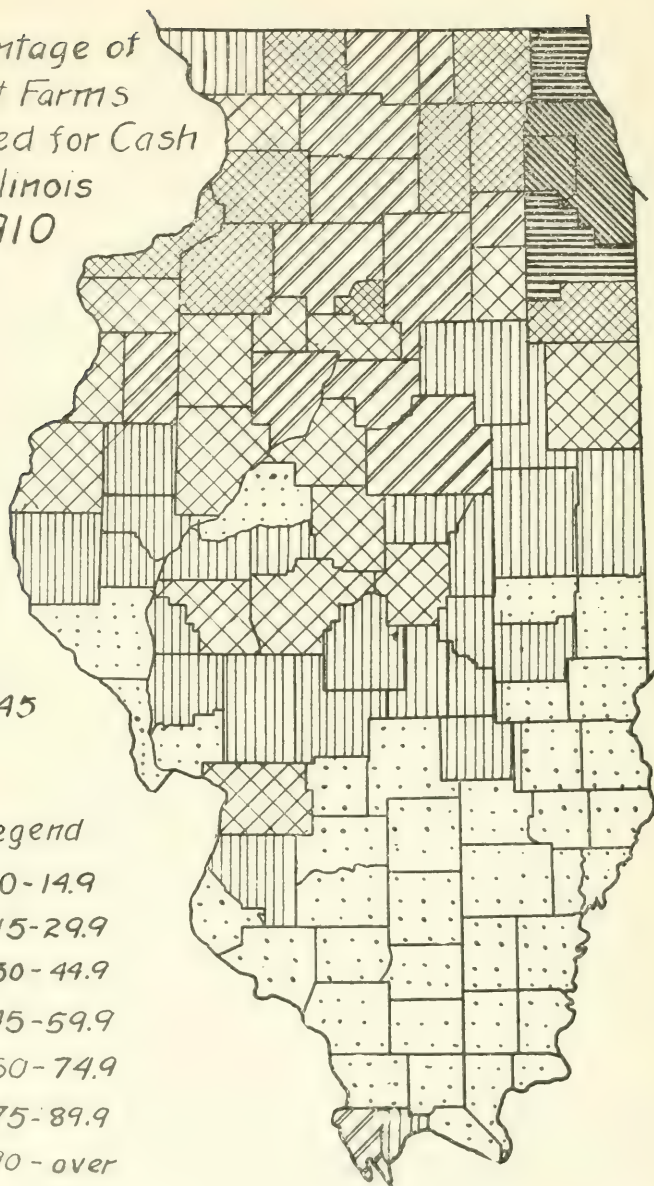
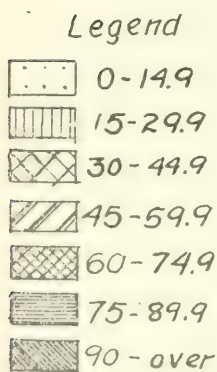
⁵Minus sign (—) denotes decrease.

⁶23,665, or 35.5 per cent, were share-cash.

⁷Moreover, the districts of the state in which the greatest decline took place from 1900 to 1910 in the percentage of farms rented for cash were the districts in which the percentage of other than cash tenants renting on the share-cash basis was the highest in 1910. Suggestion, at least, is thus given that the apparent decline in the relative prominence of cash tenancy is due to the classification of some tenants as share-cash tenants in 1910 who in 1900 would have been counted as cash tenants.

Percentage of
Tenant Farms
Rented for Cash
Illinois
1910

Census
1910
Vol VI.
436-445



were in Southern Illinois, and the remainder in Central Illinois.

Cash tenancy was relatively most prominent, therefore, in Northern Illinois, and least prominent in Southern Illinois. Since 1900 cash renting appears to have declined in relative prominence in each division of the state. Share-cash tenancy was most prominent, compared with all tenancy other than cash, in the counties of Central Illinois and the old prairie district.⁸

The reasons for this sectional difference will appear as the farms and farm practice of the various kinds of operators are described.

THE ACREAGE OPERATED

The method used by the census in presenting data on the size of farms of various tenures has undergone a change. For 1880 and 1890 the data are given for owners, cash tenants, and share tenants by acreage-groups. In 1900 the acreage-groups are continued and the farms formerly considered as those of owners are itemized into four classes. In 1910 the acreage-group data were not classified by various tenures. In both 1900 and 1910 the total acreages are given, so that averages can be calculated for farms of the several forms of tenure.

The first table shows for the tenth, eleventh, and twelfth census enumerations the percentage of farms belonging to the various size-groups that was operated under each of the several forms of tenure.

The farms of owners constituted a smaller percentage of all farms at the later census dates, and the farms of tenants made up a correspondingly increasing percentage. The farms under 50 acres were operated by owners to a larger extent in 1890 than in 1880, and those between 50 and 100 underwent only a slight increase in percentage of tenancy. The farms having between 100 and 500 acres and those having between 500 and 1000 acres were rented to a much larger degree in 1900 than at previous dates. The same movement toward tenant operation prevailed in the case of the farms over 1000 acres in size, though at a less rapid rate than in the case of the farms having between 500 and 1000 acres.

The percentage of farms operated by tenants in 1900 was highest in the farms between 100 and 175 acres in size, with those 10 to 20 acres next, and those 100 to 499 acres third. Ownership was most prevalent in the farms exceeding 500 acres,

⁸Census, 1910, VI, 438, 447.

PERCENTAGE OF FARMS OF SPECIFIED SIZES OPERATED UNDER SPECIFIED FORMS
OF TENURE, ILLINOIS, 1880-1900.⁹

	Farms of all sizes	Less than 10 acres ¹¹	10 to 19 acres	20 to 49 acres	50 to 99 acres	100 to 499 acres ¹²	500 to 999 acres	1000 acres and over
Own- ers ¹⁰								
1900 ¹³	60.7	64.5	58.4	62.5	61.6	59.5	75.3	81.9
1890	66.0	69.2	64.0	67.0	64.3	66.3	81.9	84.6
1880	68.6	65.1	54.5	58.8	65.1	74.8	87.7	89.8
All tenants								
1900	39.3	35.6	41.5	37.5	38.4	40.5	24.6	18.1
1890	34.0	30.8	36.0	33.0	35.7	33.7	18.1	15.4
1880	31.4	34.9	45.5	41.2	34.9	24.6	12.3	10.1
Cash tenants								
1900	14.5	24.0	16.2	10.1	13.2	15.7	7.5	6.4
1890	12.1	18.6	15.4	8.9	12.4	12.7	5.9	7.0
1880	8.1	16.5	13.1	8.4	8.4	7.1	4.7	2.9
Share tenants								
1900	24.8	11.6	25.3	27.4	25.2	24.8	17.1	11.7
1890	21.9	12.2	20.6	24.1	23.3	21.0	12.2	8.4
1880	23.3	18.4	32.4	32.9	26.5	17.5	7.6	7.2

followed by those under 3 acres.

It is evident that the farms of medium size were most cultivated by tenants, while the farms extraordinarily large and small were most characterized by operation by owners. It is a favorable comment on the ability of tenants to carry on large scale farming that such a large number of the farms over 500 acres are tenant farms, and that renting of the large farms was

⁹Census, 1910, V, 124; 1900, V, 48; 1890, Agriculture, 118, 119; and 1880, Agriculture, 26-29.

¹⁰Including owners proper, part owners, owners and tenants, and managers.

¹¹Data is given for two subsidiary groups, less than 3 acres, and 3 to 9 acres in 1900 and 1880.

¹²Data is given for three subsidiary groups, 100 to 174 acres, 175 to 259 acres, and 260 to 399 acres in 1900.

¹³Data is given separately for owners proper, part owners, owners and tenants, and managers in 1900.

increasing relatively faster than renting of either medium or small farms. On the other hand, this implies that the owners of large farms, though still commonly operating their farms in 1900, were giving up personal operation relatively faster than owners of smaller farms. The large farms are most inaccessible to tenants with the objective of ownership, and, except as division through inheritance takes place, their owners ought to be well able to prevent their disintegration.

The percentage of all farms operated by cash tenants nearly doubled between 1880 and 1890, while that of share tenants remained the same. Among the farms having under 100 acres the percentage of farms operated by share tenants was decreasing and the percentage operated by cash tenants was increasing between 1880 and 1900, and in the case of the farms between 100 and 500 acres and those over 1000 acres, cash tenancy was increasing more rapidly than share tenancy. The trend in tenancy among the farms between 500 and 1000 acres was toward the share basis. As pointed out previously,¹⁴ exclusively cash tenancy was not so prevalent in 1910, as was so-called "cash" tenancy in 1900.

A notion of the amount of land operated by operators of various classes can be obtained from the following table.

THE AVERAGE NUMBER OF ACRES PER FARM OF VARIOUS KINDS OF OPERATORS, AND THE ABSOLUTE AND RELATIVE INCREASE IN THE SAME, ILLINOIS, 1900-1910.¹⁵

Tenure designation	Census date		Increase in acreage		Percentage of increase
	1910	1900	1900	1910	
All operators.....	129.1	124.2	4.9		4.0
Tenants	135.8	122.2	13.6		11.2
Cash .....	.....	124.2	.....		.....
Share .....	.....	121.0	.....		.....
Managers	234.0	233.0	1.1		0.5
Owners and part					
owners	122.6	124.1	-1.5		-1.2
Owners proper	133.8	118.9	-5.1		-4.3
Part owners ...	147.5	142.9	4.6		3.2
Owned	83.7	79.9	3.7		4.7
Leased	63.9	63.0	0.9		1.4
Owners and tenants	.....	159.1	.....		.....

¹⁴See above, p. 83.

¹⁵Census, 1900, V, 8; and table, above, p. 45.

The lack of acreage-group data in 1910 makes it impossible to pursue this phase of the study with accuracy after 1900.

In 1900 the average size of all farms was 124.2 acres. Cash tenant farms and those of owners, including part owners, were almost exactly the same in average acreage as those of all tenures. Share tenants and owners proper operated smaller farms on the average. The largest farms were those of managers, which averaged nearly twice as large as the farms operated by owners proper. Part owners owned 84 acres and hired 64 on the average. Owners and tenants co-operating operated farms of 159 acres.

In 1910 data are lacking for cash and share tenants and for owners and tenants co-operating. The average acreage for all farms increased 4.0, and an increase in average acreage took place in both the owned and leased portions of the farms of part owners, in the farms of managers, and tenants. In the case of managed farms the increase was slight while in the case of tenants it was most pronounced, being 13.6 acres. The farms of owners proper lost 5 acres, on the average.

Ownership has been declining and tenancy increasing in the districts of larger farms. This accounts in the main for the apparent increase in the size of tenant farms. There seems to be little tendency for the average tenant farm to increase in size in any large part of the state.

THE EQUIPMENT OF THE VARIOUS OPERATORS

The data on farm equipment are not complete, but such as are available are presented in the next few pages.

The percentage of farm land improved in all Illinois farms was 86.2 in 1910 and 84.5 in 1900. The tenants operated farms consisting most largely of improved land,¹⁶ and the farms of managers had the smallest percentage of improved land.¹⁷

The next table shows the value of various items of farm property in the case of farms operated under different forms of tenure.

¹⁶The percentage of tenant farm land improved in 1910 was 88.8 and in 1900, 87.8, as against corresponding percentages of 84.5 and 82.6 for the land owners. See Census, 1910, V, 130.

¹⁷The percentage was 76.7 in 1910 and 74.4 in 1900. See Census, 1910, V, 130.

Land and buildings constituted 88.3 per cent of the value of all farm property in 1900 and 90.2 per cent in 1910. All items of farm property underwent a rise in value between 1900 and 1910. In the case of buildings this was probably due in some measure to better improvement of the farms, but to a greater degree, perhaps, to the rise in the value of building materials, and to a general tendency to value buildings higher because a higher value was being placed on other items of farm property. Implements and machinery and livestock also had higher value per farm and per acre in 1910 than in 1900. In the case of implements and machinery the rise in value is probably due to the utilization of more expensive types. The value of live stock has

AVERAGE VALUE IN DOLLARS OF ALL FARM PROPERTY AND OF THE SEVERAL CLASSES, CLASSIFIED ACCORDING TO THE MAJOR TENURE GROUPS,¹⁸ ILLINOIS, 1910 AND 1900.¹⁹

	All tenures		Owners		Managers		Tenants	
	1910	1900	1910	1900	1910	1900	1910	1900
All farm property								
Per farm	15,505	7,588	13,667	7,203	30,269	17,005	17,719	7,999
Per acre	120.04	61.12	111.51	58.03	129.28	72.99	120.45	65.48
Land and buildings								
Per farm	13,986	6,684	12,170	6,258	27,246	14,833	16,205	7,182
Per acre	108.32	53.84	99.29	50.42	116.41	63.65	119.33	58.78
Land								
Per farm	12,269	5,732	10,363	5,220	23,682	13,004	14,655	6,377
Per acre	95.01	46.17	84.55	42.06	101.18	55.82	107.91	52.20
Buildings								
Per farm	1,716	952	1,806	1,038	3,563	1,829	1,550	804
Per acre	13.30	7.67	14.73	8.36	15.22	7.85	11.41	6.58
Implements and machinery								
Per farm	293	170	285	170	533	246	298	177
Per acre	2.27	1.37	2.32	1.38	2.28	1.06	2.20	1.37
Livestock								
Per farm	1,226	734	1,213	773	2,488	1,928	1,214	650
Per acre	9.49	5.91	9.90	6.23	10.63	9.27	8.94	5.32

¹⁸Data for the minor tenure groups are given for 1900. See Census, 1900, V, 149.

¹⁹Census, 1910, V, 130, 134; VI, 413; and 1900, V, 149, 252.

risen not so much because of increase in the number of animals as in the value per head.

It will be observed that the value of the property in managed farms averaged highest in value at both census dates, and the value per acre of the farm property of managers was greater than that of either owners or tenants in 1900. In 1910, however, the highest average value per acre of farm property was attached to the farms operated by tenants. In the value of buildings, managed farms had the highest average per farm in 1900 and per acre as well as per farm in 1910. The value of buildings on rented farms was lower than on other farms both per acre and per farm in 1900 and 1910. The value of implements and machinery per acre was greatest on the farms of owners at both dates and in 1910 least on those of tenants. The farms on which live stock reached the largest average value per acre and per farm were the farms of managers. On the farms of tenants the value of live stock was less than on the farms of any other kind of farm operator.

The statistics for 1900 show the value of property to be much different when farms are rented for cash than when rented on shares. The value of all farm property per acre in 1900 was greater in the case of cash tenants than in the case of farmers of any other tenure. In value of buildings per acre cash tenant farms were somewhat above the average, while the average value of buildings per acre in this case of share tenant farms was less than in the case of farms of any other form of tenure, being 40 per cent less than on cash rented farms. The value of implements and machinery per acre was greater in the case of cash tenant farms than in that of farms of any other tenure. The value of live stock per acre was above the average on the farms of cash tenants and least in the case of the share tenant farms.

The various classes of operators differ somewhat in the extent to which they keep different kinds of animals on their farms.

Over 90 per cent of Illinois farms in 1910 were reported to have domestic animals, poultry, cattle, dairy cows, and horses.²⁰ Domestic animals, poultry, bees, dairy cows, horses, and swine were reported for a smaller percentage of managed farms and a larger percentage of owned farms than of tenant farms. Mules were reported by a larger percentage of managers than of operators of other tenure. Only in the case of horses and mules

²⁰Census, 1910, V, 130, 142, 146.

did the percentage of owners reporting them fail to exceed the corresponding percentage in the case of other operators.

Domestic animals were distributed among the various classes of operators in very much the same proportion as the number of farms and acres of farm land.²¹ Between 1900 and 1910 the value of domestic animals on the farms of tenants increased at a much more rapid rate than on the farms of owners. Poultry and bees averaged higher in value on the farms of owners than on the farms of other classes of operators.

The value of other than dairy cattle was largest on the farms of owners,²² while the values of dairy cows were distributed among the operators of different tenures more nearly according to the distribution of farms and acreages. Judging from the values reported horses were distributed in almost exactly the same proportions as the improved acreage. Mules were evidently employed to an extraordinarily large extent by managers. Asses and burros, sheep and swine were kept by the operating owners to a disproportionately high degree. In swine, however, the tenants had values approaching their share.

It appears that in the case of all animals but sheep the most valuable stock was on the managed farms.²³ Operating owners possessed the most valuable sheep, but in the case of all other animals the value of their stock per head was even less than that of tenants.

SOME ITEMS OF INCOME AND EXPENDITURE

Data were gathered at the twelfth census showing for the various classes of operators the value of the products of 1899 and the average expenditures for labor and fertilizers.²⁴ The value of products per farm was highest in the case of managed farms and lowest in the case of farms of share tenants. On the basis of values per acre, however, cash tenants held first rank, and co-operating owners and tenants made the least showing. Managers fed to live stock a larger value of products per farm and per acre than other operators. Share tenants fed the least on either basis of comparison.

Co-operating owners and tenants by furnishing their own labor were enabled to cut down the labor expenditures to \$.50

²¹Census, 1910, V, 142, 150, and VI, 414.

²²Census, 1910, V, 150, 153.

²³Census, 1910, V, 153.

²⁴Census, 1900, V, 149, 232.

per acre, the least of any class of operators. Managers expended the most per acre, \$1.46. The expenditure for fertilizers was so small that comparisons are of little value. It seems, however, that in 1899 the expenditure for fertilizers was least in the case of farms operated by share tenants.

Statistics are presented in the Census to show the tendencies prevalent among operators of different tenures in raising products for the market in 1899.²⁵

Owners operated less than their proportion of the farms whose values of products not fed to live stock were under \$100 and over \$1,000. Owners and tenants, and part owners operated less than their share of the farms with values of unfed products under \$250, and more than their share of the farms in the other value-groups. The managed farms were heavily concentrated in the groups having no unfed products and in all value-groups under \$1000. Cash tenants showed a somewhat similar tendency. Share tenants, however, operated more than their proportion of the farms with unfed products valued at more than \$1000, as well as of the farms with values of unfed products less than \$250.

These data must be interpreted with due allowance for a number of other factors. The size of farms has much to do with the valuableness of the products raised. Small farms and very large farms are operated by owners to a greater degree than are farms of medium size. The figures employed here, moreover, are not based on values of all products raised, but only of those products not fed to livestock on the farms raising them. Farms raising products which are fed to livestock are certainly not, for that reason, less productive of value. Finally, it would be useless and unfair to make deductions from such data as to the relative efficiency of the various classes of operators.

EMPHASIS IN FARM PRACTICE

Statistical evidence on the relation of farm tenure to various types of farming practice relates only to 1899. The census of 1900 classified farms according to the principal source of income as shown by the productions of the preceding year. Changes have doubtless occurred since 1899 both in the number of farms having the specified productions as their principal source of income and in the percentage of farms in each production group operated by the various classes of operators. The following table summarizes the data gathered in 1900 so far as related to Illinois.

²⁵Census, 1900, V, 35.

CLASSIFICATION BY TENURE OF FARMS WITH SPECIFIED PRINCIPAL SOURCES OF INCOME, ILLINOIS, 1899.²⁶

Principal source of income	Number of farms	Percentage of farms operated by					
		Own-ers	Part owners	Owners and ten-ants	Man-agers	Cash tenants	Share ten-ants
All farms	264,151	46.1	13.0	0.9	0.7	14.5	24.8
Hay and grain.....	107,020	33.3	12.3	0.7	0.7	18.1	34.9
Vegetables	6,656	38.4	10.9	0.5	0.5	35.9	13.7
Fruits	2,411	67.3	10.1	0.7	1.7	8.4	11.7
Livestock	113,674	56.7	14.5	1.2	0.8	9.1	17.8
Dairy produce.....	15,602	50.3	7.9	0.5	0.9	24.5	15.9
Tobacco	138	39.9	22.5	.....	0.7	12.3	24.6
Sugar	60	40.0	16.7	.....	1.7	13.3	28.3
Flowers and plants	499	74.7	5.8	0.8	3.8	14.6	0.2
Nursery products..	126	84.9	7.9	.....	2.4	4.0	0.8
Miscellaneous	17,965	50.2	13.6	1.2	0.6	10.7	23.8

Hay and grain farming was carried on with greatest emphasis by the tenants, particularly the share tenants, while owners operated much less than their proportionate number of such farms. Owners operated less than their share of the farms producing vegetables as their main crop. Tenants operated nearly half of the vegetable farms, and over two-thirds of those rented were on the cash basis. Fruit farms were operated chiefly by owners and managers, the tenants being in charge of only about half their proportionate share. Farmers specializing in livestock were usually owners of their places. All classes of operators except tenants showed a leaning toward live stock farming. The latter were in charge of only two-thirds of their proportionate share of these farms. The renting of live stock farms inclined toward the share basis. The owners proper, managers and tenants operated dairy farms with somewhat greater emphasis than their relative numbers would indicate. As in the case of vegetable farms cash tenancy was much more prevalent than share tenancy. The tobacco and sugar farms were largely operated by part owners. Farms raising flowers, plants and nursery products were operated mainly by owners and managers. So far as such farms were rented it was almost exclusively on the cash basis. The farms whose principal source of income was miscellaneous need not be regarded as farms on which productions were diversified. They are simply those whose principal source of

²⁶Census, 1900, V, 9.

income was some production other than those listed. The tenure of such farms has no peculiarities worth discussing.

The part played by owners in the operation of farms specializing in the different crops is much the same in Illinois as in the country as a whole.²⁷ One exception is that of vegetable farms, 60.4 per cent of which are owned by the operators in the United States, as against a percentage of 38.4 in Illinois. Operation by owners is somewhat more prevalent among farms raising nursery products in Illinois than in the whole country. The place occupied by part owners is more prominent in the cultivation of tobacco farms in Illinois than in the country as a whole, although in the case of farms raising nursery products the opposite holds true. The prominence of managers in the operation of sugar farms which is characteristic of the United States as a whole does not stand out as a feature of the few sugar farms of Illinois. The tenants of Illinois follow very much the same types of farming as those in the rest of the country, except that farms raising dairy produce are rented to a greater extent on the cash basis in Illinois.

The twelfth census also supplied data for ten important crops showing the number of farms reporting, the number of acres raised and the number of bushels harvested in 1899.²⁸ The results of a study of these data are summarized in the following paragraphs.

Corn was raised by almost every farmer in the state in 1899. Irish potatoes and hay and forage were cultivated by two farmers in three, and oats by three in five. The share tenants, owners and tenants, and part owners raised corn to an extent greater than the average. Oats was more widely raised by the cash tenants and part owners; wheat, buckwheat, Irish potatoes, sweet potatoes, hay and forage by part owners and by owners and tenants. Of the tenants those renting on shares contributed more prominently to the production of corn, wheat and sweet potatoes.

The corn acreage per corn farm was greater than the corresponding acreage per farm of any other crop. Oats came second and wheat third. Sweet potatoes and Irish potatoes were raised in patches of very small size. The corn acreage was largest on the managed farms reporting corn. If the farms reporting corn were of the same size as the average farm of each form

²⁷See above, p. 26.

²⁸Census, 1900, VI, 96-107, 220, 221, 342-345, 530 and 531.

of tenure, the percentage of the managed acreage in corn was less than the corresponding percentage of the acreage in farms of other tenures. It seems probable that the percentage of the land devoted to corn production was greater in the farms of cash and share tenants than of other operators.

Considering the percentage of all the land in the state devoted to the production of certain crops it appears that cultivation by owners was especially prominent in the case of sweet potatoes, hay and forage, but was relatively little associated with the production of oats and corn. Part owners and owners and tenants devoted their land to the raising of tobacco, buckwheat and wheat relatively more than to other crops. Managers were especially concerned with raising rye, hay and forage. Cash tenants emphasized the raising of Irish potatoes and barley, and neglected the production of tobacco, wheat and sweet potatoes. Share tenants placed their emphasis on wheat, corn and oats.

The data on yields per acre for each kind of tenure are presented below.

AVERAGE YIELD PER ACRE OF SELECTED CROPS ON ACREAGES CLASSIFIED
ACCORDING TO TENURE, ILLINOIS, 1899.²⁹

Production	Unit	All tenures	Owners	Part owners	Owners and tenants	Managers	Cash tenants	Share tenants
Barley	Bus.	32.1	33.0	31.7	26.8	31.8	31.8	30.3
Buckwheat	"	10.5	10.0	9.9	10.4	8.0	11.4	10.5
Corn	"	38.8	38.3	37.6	35.8	41.6	41.3	38.4
Oats	"	39.5	39.5	38.0	36.5	40.8	40.9	39.2
Rye	"	14.0	13.8	13.9	12.9	16.3	15.5	13.4
Wheat	"	10.8	10.8	10.3	9.8	11.9	13.1	11.1
Potatoes	"	94.9	96.3	95.2	89.1	97.7	95.0	91.1
Sweet potatoes	"	67.9	66.6	74.3	83.4	102.6	68.2	65.4
Hay and Forage.....	Tons	1.2	1.2	1.2	1.2	1.2	1.2	1.2
Tobacco	Lbs.	645.5	660.6	618.8	511.5	643.3	811.4	622.8

Precaution should be taken at the outset against explaining all differences in yields in terms of the relative producing efficiency of the farmers operating under different tenures. In the first place, the farmers of different tenures are not uniformly distributed over the different grades of soil. In the second place,

²⁹Census, 1900, VI, 96-107, 220-221, 342-345, 530, and 531.

climatic conditions, insects, and the like do not ordinarily affect all grades of soil and all kinds of operators in the same way, and certainly not during any one year. Making allowance for these facts it is still worth while to study the foregoing table.

Owners obtained highest yields only in the production of barley. Part owners, owners and tenants, and share tenants showed no unusually large yields in any crops. Cash tenants had the largest yields in buckwheat and tobacco. Cash tenants and managers obtained the highest yields in the production of corn, oats, rye and wheat. Managers stood highest in the yields of hay and forage, and sweet potatoes.

It is an interesting fact that, although the share tenants were cultivating their full portion of the fertile land, they exceeded the average yield only in the production of wheat. Cash tenants, on the other hand, had a yield above the average in the case of every production except barley. The cash tenants are to be found largely in the Northern part of the state where farming practice is more diversified and where live stock plays a more important part in the farming. Perhaps part of the superiority in yields characteristic of the farms of cash tenants was due to larger use of animal matter as fertilizer and to a less degree of specialization in cereal production. The higher yields on the managed farms may likewise be due in considerable measure to superiority of farming method.

MORTGAGE ENCUMBRANCE ON OWNED LAND

As indicated in Chapter I³⁰ mortgage statistics relate only to land operated by the owners, the part owners in most cases having limited their reports to the land owned by them.

The next table summarizes the data on encumbrance of farm property operated by owners in Illinois.

Between 1890 and 1910 the number of all "owned" places declined 9 per cent, the number of mortgaged places decreased 5 per cent, while the number of farms free from mortgage declined 14 per cent. Mortgaging was relatively most prominent in 1900 and appears to have undergone little change since that date. In 1910, 38,662 of the 55,792 farms reported as mortgaged were wholly owned by the operators.³¹ The number of farms of part owners thus reported mortgaged, 17,130, constituted 45.5 per cent of all farms of part owners. The percentage of owners proper

³⁰See above, p. 18.

³¹Census, 1910, VI, 414.

operating under mortgage was 38.3. The fact that the part owners were under mortgage on their owned land in so many cases is not proof either that they have been rising from a lower or descending from a higher economic status. The fact that a part owner operates rented land in addition to a good-sized place of his own is merely evidence that he is influenced to exert extraordinary efforts to clear his land of encumbrance.

THE NUMBER AND PERCENTAGE OF OWNED FARMS AND FARM HOMES MORTGAGED AND UNENCUMBERED, ILLINOIS, 1890-1910.³²

	Owned farms ³³ 1910		Owned farm homes 1900		Owned farm homes ³⁴ 1890	
	Number	Per cent ³⁵	Number	Per cent	Number	Per cent
Total	145,107	.....	158,394	.....	160,065	.....
Free from mortgage	86,713	60.8	92,702	60.7	101,305	63.3
Mortgaged	55,792	39.2	60,063	39.3	58,760	36.7
Unknown	2,602	.....	5,629	.....	.....	.....

The accompanying map shows the difference between counties in the percentage of owned farms under mortgage in 1900. In three counties the percentages exceeded 50.³⁶ Twelve counties had percentages between 45 and 50.³⁷ Most of the counties with high percentages of owners operating under mortgage are river counties in which the farm area has been growing. It seems probable, therefore, that mortgages were laid for the acquisition of newly developed land to a considerable extent in those counties. The East Central counties where land prices have been increasing most rapidly constitute another district of considerable mortgaging. The explanation probably lies in the fact that owners are trying to enlarge their holdings and have employed mortgages to assist them, and that owners and part

³²Census, 1910, VI, 414.

³³Includes all farms owned in whole or in part by the operator.

³⁴The 1,813 "owned farm homes" for which no reports were secured were distributed between "free from mortgage" and "mortgaged" in 1890.

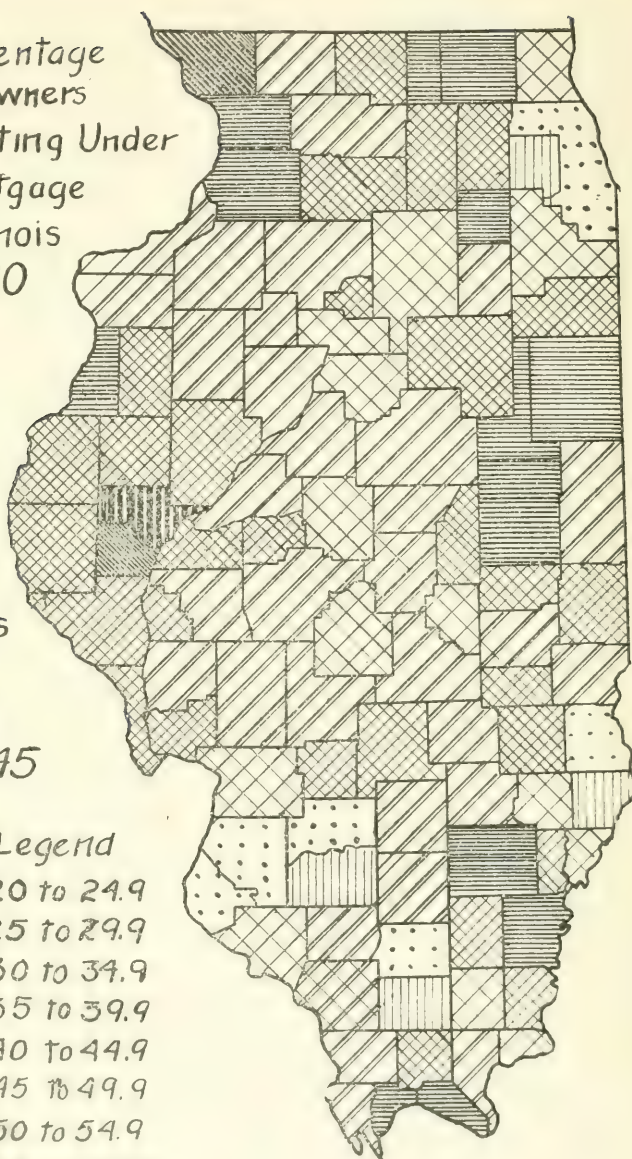
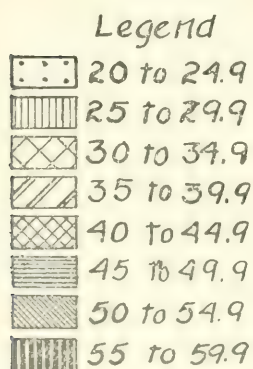
³⁵Per cent of combined total of "free from mortgage" and "mortgaged".

³⁶Brown, 50.7; Jo Daviess, 51.1; and Schuyler, 57.1.

³⁷Whiteside 49.7, Iroquois 47.8, Carroll 47.4, Henderson 47.2, Massac 47.1, Wayne 47.1, Ford 46.8, Champaign 46.2, Pulaski 45.3, McHenry 43.2, Boone 45.1, and White 45.1.

Percentage
of Owners
Operating Under
Mortgage
Illinois
1910

Census
1910
Vol. VI
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owners who have risen from tenancy have been all the more under the necessity of mortgaging in these districts.

Data regarding the amount of mortgage debt were gathered in 1910 and 1890, but not in 1900. Only the farms consisting wholly of owned land were included in 1910. In 1890 part ownership had not yet been recognized by the census. Of the 38,662 mortgaged farms owned by owners proper in 1910, 1,724 gave no usable reports on debt and value. Taking the statistics at hand, however, the following table is presented.

THE NUMBER OF OWNED FARMS AND FARM HOMES MORTGAGED, THEIR VALUE, THE AMOUNT OF MORTGAGE DEBT AGAINST THEM, THE PERCENTAGE OF VALUE COVERED BY MORTGAGE, AND THE AVERAGE VALUE, DEBT AND EQUITY PER FARM, ILLINOIS, 1910 AND 1890.³⁸

	Owned farms or farm homes mortgaged		Increase	
	1910 ³⁹	1890 ⁴⁰	Amount	Per cent
Number	36,938	78,760	.....	.....
Value—land and buildings....	\$454,857,222	\$285,706,170	.....	.....
Amount of mortgage debt.....	\$115,799,646	\$98,940,935	.....	.....
Per cent of debt to value.....	25.5	34.6	.....	.....
Average value per farm	\$12,314	\$4,862	\$7,452	153.3
Average debt per farm	\$3,135	\$1,684	\$1,451	86.2
Average equity per farm.....	\$9,179	\$3,178	\$6,001	188.8

The average mortgage debt per farm in Illinois in 1910, \$3,135, was exceeded by that prevailing in three other states. These were Nevada, \$4,738; Iowa, \$4,048; and Nebraska, \$3,154.⁴¹ The average equity per farm in Illinois in 1910, \$9,179, was exceeded in three other states: Nebraska, \$11.322; South Dakota, \$10.782; and Iowa, \$10.526. It will be observed that all of these states are located west of the Mississippi river. In ratio of debt to value in 1890 and in 1910 the percentage in Illinois was exceeded in 26 states. Most states in which the percentage of value covered by mortgage exceeded that in Illinois were located east of the Mississippi. It appears, therefore, that Illinois has shared with the Western states the tendency for land values to

³⁸Census, 1910, VI, 415.

³⁹Includes only farms consisting wholly of owned land and reporting value of farm and amount of debt.

⁴⁰Includes all owned farm homes, estimates being made of value of farms and amount of debt for all defective reports.

⁴¹Census, 1910, V, 167.

increase more rapidly than mortgage indebtedness, rapid as the increase in indebtedness has been.

A map is also presented illustrating by counties the percentage of value of owned farms covered by mortgage in 1910. For the most part it appears that the counties with the highest percentages were located in Northern Illinois. The lowest percentage was that of Calhoun county, 3.1.⁴² Low percentages characterize the counties in East Central Illinois and in the eastern half of Southern Illinois. In the case of the East Central Illinois counties, the low percentages are probably explained by the rapid rise in land values characteristic of the ten or twelve years preceding 1910. In Southern Illinois, though land values have not run away from mortgage indebtedness so rapidly, there has not been the stimulus toward mortgaging such as that afforded by the rate of advance in land prices in other parts of the state. In Northern Illinois the practice of mortgaging the value of the land heavily seems to be most prevalent. That this is due to lack of prosperity seems hardly likely, for the existing evidence, meager though it is, points to a greater prosperity, especially among tenants, in that part of the state.⁴³ Such being the case, the suggestion arises that probably the chances for land acquisition are stronger in Northern Illinois. Since the farming practice is such as naturally to conserve the soil and since land prices have not been so much affected by increment, the proportion of the acre value for which mortgages can be negotiated is larger.⁴⁴

On the whole it appears that the "calamity" element has not been a significant cause of mortgaging in Illinois, though no specific investigations of that feature have been made in the last twenty-five years.⁴⁵ Since the data are limited to operating owners the mortgaging of leased land has been left out of consideration. This is commonly supposed to be a small factor, yet

⁴²This is so much less than the percentages in adjacent counties as to lead one to suspect the accuracy of the reports.

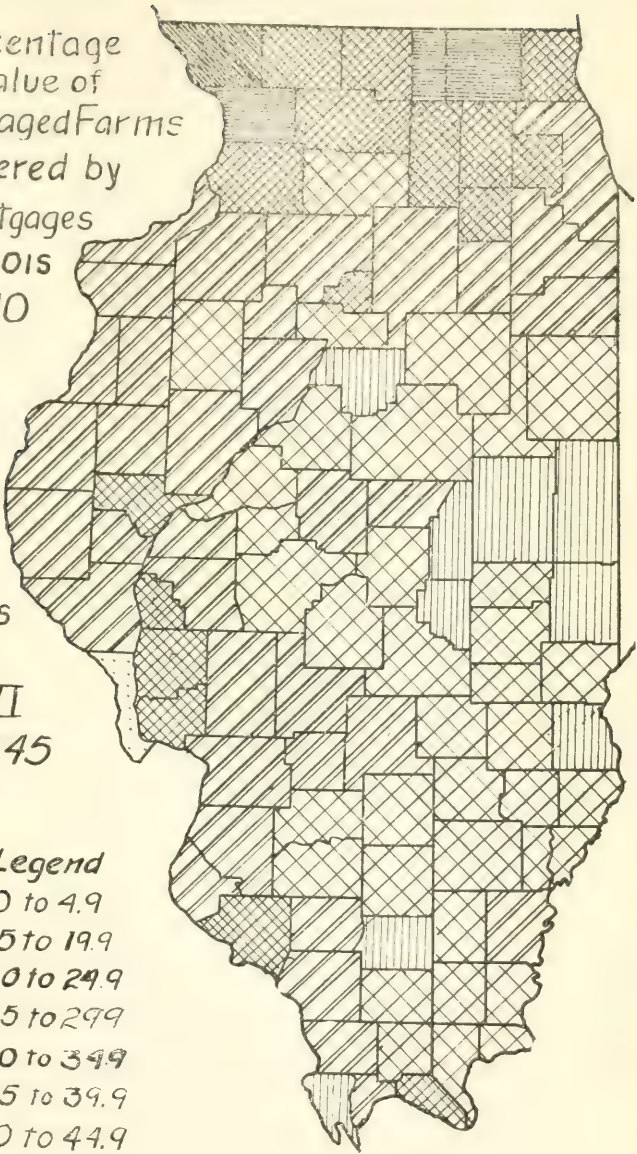
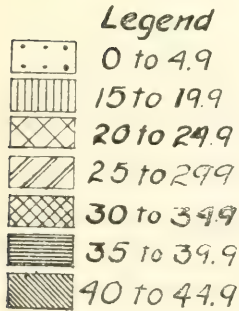
⁴³Stewart, C. L., *Analysis of Rural Banking Conditions in Illinois*, 19 and 20.

⁴⁴*Ibid.*, 14 and 15.

⁴⁵The only investigations from which any light can be obtained on this question in Illinois were those of the Bureau of Labor Statistics of Illinois covering the dates 1870, 1880, and 1887, reported by Secretary John S. Lord in the Fifth Biennial Report of the Bureau, 1888, and that of the United States census of 1890, reported in the volume on Farms and Homes: Proprietorship and Indebtedness.

Percentage
of Value of
Mortgaged Farms
Covered by
Mortgages
Illinois
1910

Census
1910
Vol VI
436-445



an investigation of the question under a regime of rising land prices might reveal some important facts.

RACE, COLOR AND NATIVITY OF FARMERS

Statistics on race, color and nativity of farmers were gathered in 1890, 1900 and 1910. At the census of 1890 the basis of investigation was the occupier of the farm, in 1890 the occupier of the farm home, and in 1910 the operator of the farm. The following table summarizes the data for Illinois by major nativity groups.

THE COLOR AND NATIVITY OF FARMERS CLASSIFIED BY TENURE, ILLINOIS,
1890-1910.⁴⁶

Color and nativity groups	Date	All farmers	Percentage in each group	Owners	Tenants	Managers	Percentage of group classified as		
							Owners	Tenants	Managers
Total	1910	251,872	100.0	145,107	104,379	2,386	57.6	41.4	0.9
	1900	262,180	100.0	158,394	101,728	.....	60.4	39.6	.....
	1890	252,953	100.0	160,065	92,888	.....	63.3	36.7	.....
Native white	1910	217,053	86.2	123,907	91,014	2,132	57.1	41.9	1.0
	1900	208,884	79.7	124,498	82,662	.....	59.7	40.3	.....
	1890	190,234	75.2	117,223	73,011	.....	63.7	36.3	.....
Foreign-born white	1910	33,394	13.3	20,411	12,747	236	61.1	38.2	0.7
	1900	51,722	19.7	33,059	18,345	.....	64.1	35.9	.....
	1890	61,044	24.1	42,080	18,964	.....	69.2	30.8	.....
Negro and other non-white ⁴⁷	1910	1,425	0.6	789	618	18	55.4	43.4	1.3
	1900	1,574	0.6	837	721	.....	53.2	46.8	.....
	1890	1,675	0.7	762	913	.....	45.7	54.3	.....

⁴⁶Census, 1910, VI, 416; 1900, II, 715, 744; and 1890, *Farms and Homes*, 567, 591.

⁴⁷The number of non-whites other than negroes was made up as follows: Chinese and Japanese, 1910, 1, 1900, 5, and 1890, 2; Indians, 1910, 2, 1900, 0, and 1890, 3.

It appears that the percentage of Illinois farmers who were native-born whites increased from 75.2 in 1890 to 86.2 in 1910. The percentage of native-born white farmers owning their farms was at each date less than the corresponding percentage among foreign-born white farmers. The farm managers were foreign-born in relatively few instances. The negro and other non-white farmers declined in number during each decade, and at each date constituted less than 0.7 per cent of all farmers in the state. The percentage of negro and other non-white farmers owning their farms was at each date smaller than the corresponding percentage for either group of white farmers, but increased at a rapid rate during the twenty years. The growth of ownership among non-white farmers in Illinois contrasts with the decline in ownership among the white farmers of the state.

The number of non-white farmers other than negroes was 5 in 1890 and 1900 and 3 in 1910. Separate data for the negroes were not reported in 1910. In 1890 and 1900 the percentage of their farms and homes owned by them was 43.2 and 53.7, respectively.⁴⁸ In 1900 the percentage of negro farmers in each tenure group was as follows: owners, 36.5; part owners, 11.5; owners and tenants, 0.8; managers, 0.3; cash tenants, 14.6; and share tenants, 36.3.⁴⁹ The discrepancy between the figures is possibly due to home ownership in some cases unaccompanied by farm ownership. Tenancy, especially share tenancy, was more common among the negro farmers than among the white farmers.⁵⁰

Data on the country of nativity of occupiers of farms and

⁴⁸Census, 1900, II, 714; and, 1890, *Farms and Homes*, 567.

⁴⁹Census, 1900, V, 50, 52. The corresponding percentages for farms operated by whites in 1900 were: owners, 46.1; part owners, 13.0; owners and tenants, 0.8; managers, 0.7; cash tenants, 14.5; and share tenants, 24.8.

⁵⁰The negro farmers in Illinois in 1899 were specializing in vegetable, fruit, tobacco, sugar and miscellaneous lines of farming to a greater extent than were white farmers. The farms of negroes were much smaller than those of white farmers, the percentage of farms under 50 acres in size being 66.5 in the case of colored farmers as against 22.8 in the case of white farmers. (Census, 1900, V, 51, 53.) The negro farmers of Illinois are located chiefly in the Southern counties. The counties in which the percentage of farms run by negroes in 1900 was 1.0 or over are as follows: Pulaski, 31.3; Alexander, 13.6; Massac, 8.2; Pope, 3.2; Saline, 3.0; Jackson, 2.2; St. Clair, 1.8; Madison, 1.6; Clinton, 1.5; Lawrence, 1.3; White, 1.2; Sangamon, 1.1; Randolph, 1.0; and Hardin, 1.0. (Census, 1900, V, 73-75).

farm homes in Illinois are available for 1890 and 1900,⁵¹ and, in a form scarcely comparable with the data of preceding dates, in 1910.⁵²

The number of occupiers of farm homes in Illinois in 1900 who were not born in foreign countries is given as 156,688 in this series, while in the last table the number of farmers who were native-born whites in 1900 was 208,864. The discrepancy casts discredit upon the statistics. It appears, nevertheless, that the Germanic was the strongest single element among the farmers in the state, and that those born in the British isles were next in relative numbers.

The percentage of ownership in 1890 was above the average among the Austro-Hungarians, the French (both Canadian and European), the Germans, Irish, Scotch, Italians, and those coming from Russia and Poland. In 1900 the percentage of ownership was above the average among the Austro-Hungarians, the British, particularly the Irish, the Italians and the Polish. Ownership free from encumbrance in 1890 was especially characteristic of the Austro-Hungarians, the French, the Germans, the Scotch, and the Italians, and in 1900 was found especially among the Austro-Hungarians, the Germans, the Italians and those from "other countries". The percentage of ownership was least among the Scandinavians. Those born in Russia and Poland were characterized by ownership in a high degree, but were largely under mortgage.

RESIDENCE AND LANDED WEALTH OF OWNERS

The twelfth census was the only one at which data were gathered on the residence and landed wealth of the owners of rented farms. Nearly nineteen out of each twenty rented farms were owned by residents of the state.⁵³ Of the remaining 5.5 per cent of the farms, three-fifths were owned by residents of the North Central states. The owners residing in the North Central states owned the largest number of rented farms each. The 27 owners residing in foreign countries held 28 rented farms.

Of the 98,730 rented farms with residence of owners known,

⁵¹Census, 1900, II, 744; and 1890, *Farms and Homes*, 591.

⁵²Census, 1910, VI, 416.

⁵³Census, 1900, V, 309.

The number of rented farms with owners reported is less than the total number of tenant farms reported in other tabulations. The incompleteness of the data, however, need not be regarded as greatly injuring their usefulness.

76.8 per cent were held by owners residing in the same county; 17.9 per cent were held by owners residing in other Illinois counties; and 5.3 per cent by owners residing in other states.⁵⁵ The average acreage and the average value per farm were least in the case of the rented farms of owners residing in the same county, and most in the case of those of owners residing in other counties of the state. The average value per acre, however,

The tendencies in ownership among the different population elements in Illinois is shown in the next table.

PERCENTAGE OF FARMS AND HOMES OWNED AND RENTED BY OCCUPIERS BORN IN VARIOUS COUNTIES, ILLINOIS, 1890 AND 1900.⁵⁴

Nativity of occupiers	Percentage of places				Percentage of Owners			
	Owned		Rented					
	Farm homes	Farms	Farm homes	Farms	Free		Encumbered	
	1900	1890	1900	1890	1900	1890	1900	1890
All occupiers	60.9	63.3	39.1	36.7	60.7	63.3	39.3	36.7
Austria-Hungary	65.9	66.6	34.1	33.3	63.2	66.3	36.8	33.7
Canada (English)	56.4	59.8	43.6	30.2	55.9	56.2	44.1	43.8
Canada (French)	57.7	71.8	42.3	28.3	46.6	52.3	53.4	47.7
France .....	.....	74.7	.....	25.3	.....	68.8	.....	31.2
Germany	59.7	68.2	40.3	32.8	61.8	66.1	38.2	33.9
Great Britain.....	66.4	60.6	33.6	39.4	55.2	62.6	44.8	38.4
Ireland	68.5	78.8	31.5	21.2	59.2	62.7	40.8	37.3
Scotland .....	.....	79.8	.....	20.2	.....	69.0	.....	31.0
Italy	66.0	79.1	34.0	20.9	61.0	68.8	39.0	31.2
Russia and								
Poland	81.3	81.3	18.7	18.7	46.6	50.5	53.4	49.5
Poland	84.6	.....	15.4	.....	44.6	.....	55.4	.....
Russia	46.6	.....	53.4	.....	64.2	.....	35.8	.....
Scandinavia	44.8	52.4	55.2	47.6	44.6	47.9	55.4	52.1
Mixed foreign								
parentage	56.8	.....	43.2	.....	56.2	.....	43.8	.....
United States								
(or unknown)	61.4	61.4	38.6	38.6	62.3	63.7	37.7	36.3
Other countries..	55.4	60.1	44.6	39.9	62.9	65.4	37.1	34.6

⁵⁴Census, 1900, II, 744; and 1890, *Farms and Homes*, 591.

⁵⁵Census, 1900, V, 310, 311.

was greatest in the case of the farms of those owners residing in the county in which the farms were located and least in the case of those dwelling in other counties of the state. The percentage of tenant farms rented for cash increased with the distance of the owners from their farms, although 65 per cent of the rented farms owned by residents of other states were leased on the share basis.

The table on the next page throws light on the concentration of ownership of rented farms as shown by the census of 1900. It is to be regretted that similar data are not available for 1910.

The first column shows data based on the number of owners of rented farms. Of these owners 85.0 per cent owned a single farm each, 95.3 per cent owned fewer than three farms, and 98.8 per cent owned fewer than five farms. Fewer than 200 acres each were owned by 74.6 per cent of the owners. One owner of rented farms in 1000 owned over 2500 acres. The value of the farms was under \$5000 in the case of 48.2 per cent of the owners, and exceeded \$25,000 in the case of 5.3 per cent.

The second, third and fourth columns are based, not on owners, but on rented farms possessed by owners of various classes. Of the rented farms 68.0 per cent were owned by owners holding deeds to one farm each, and 7.8 per cent by owners possessing over five farms each. The farms belonging to owners of one farm each were slightly below the average in size and still more so in value. Those belonging to owners of two and under five farms were somewhat above the average in size and value. Those possessed by owners of ten and under twenty farms were above the average in both size and value, especially in value. One per cent of the rented farms were held by owners of twenty farms and over, and these farms were above the average in size, but below the average in value.

The farms possessed by owners owning under 200 acres were below the average in acreage and value, while the farms of all owners holding more than 200 acres of rented land were above the average in those respects. It is more natural to expect this to be true regarding the acreage than the value. The rented farms belonging to owners of 2500 acres or more were farther below the average in value than those in any other group. Considering value alone, however, there was considerable concentration of ownership in the hands of farm owners owning 500 or more acres.

The classification of rented farms according to the value

THE PERCENTAGE OF OWNERS OF RENTED FARMS WHO POSSESSED SPECIFIED AMOUNTS OF FARM PROPERTY; THE PERCENTAGE OF RENTED FARMS POSSESSED BY EACH CLASS OF OWNERS OF RENTED FARMS; AND THE PERCENTAGE OF ACREAGE AND OF THE VALUE OF ALL RENTED FARMS COMPRISED IN THE FARMS OF THE VARIOUS CLASSES OF OWNERS, ILLINOIS, 1900.⁵⁶

Basis of classifying owners of rented farms	Percentage of			
	Owners of rented farms who possess	Rented farms held by owners who possess	Acreage of all rented farms of owners who possess	Value of all rented farms in farms of owners who possess
Number of farms				
One	85.05	67.00	65.88	64.82
Two	10.30	16.23	16.50	16.62
Three and under five.....	3.49	8.99	9.83	9.83
Five and under ten.....	0.95	5.03	4.99	5.10
Ten and under twenty.....	0.17	1.69	1.74	2.68
Twenty and over.....	0.04	1.06	1.14	0.96
Acres				
Under 100	40.07	33.05	12.96	13.48
100 and under 200.....	34.57	30.40	28.84	30.60
200 and under 500.....	21.93	25.84	38.38	38.06
500 and under 1000.....	2.73	6.58	10.89	10.51
1000 and under 2500.....	0.60	2.98	5.18	4.87
2500 and over.....	0.10	1.15	3.73	2.48
Value				
Under \$1000.....	10.75	8.83	2.18	0.62
\$1000 and under \$2000.....	10.18	8.63	4.18	1.56
\$2000 and under \$5000.....	27.28	23.52	16.46	11.60
\$5000 and under \$10,000.....	25.35	19.59	19.04	17.06
\$10,000 and under \$25,000.....	21.12	26.58	37.14	41.40
\$25,000 and over.....	5.32	12.85	20.99	27.76

of rented farms owned by their owners shows that those owned by owners holding a value of less than \$10,000 were considerably below the average in size and value per acre. Rented farms owned by owners whose holdings in such farms had a value ex-

⁵⁶Census, 1900, V, 312-317.

ceeding \$10,000 were above the average both in size and in value.

On the whole it appears that the owners of larger and more valuable areas of land have their land operated on a scale above the average. The concentration of holdings in the hands of the wealthier land owners, while not great, was considerable.

AGE OF OPERATORS IN RELATION TO TENURE AND ENCUMBRANCE

Statistics were gathered on the ages of operators in 1890, 1900 and 1910.

The percentage of all farmers who were under 25 years of age was greater in 1910 than at the earlier dates.⁵⁷ This was due chiefly to the relative increase in the prominence of younger tenants. Farmers between 25 and 34 years of age declined in relative numerical importance among both owners⁵⁸ and tenants from 1890 to 1910. Those between 35 and 54 years old increased in relative numbers among both owners and tenants between 1890 and 1910. Those 55 years old and over declined in relative prominence among both classes of operators. This decline was especially marked in the case of those 65 years old and over as shown by the data for 1900 and 1910.

The graph illustrates the distribution of the owners and of the tenants among the age-periods for 1890, 1900 and 1910.⁵⁹ The age period, 35 to 44, is one which included a slightly higher percentage of the tenants than of the farmers.⁶⁰ The ages under 35 included a greater portion of the tenants than of the owners, while the ages over 44 included a much greater portion of the owners than of tenants. The percentage of owners comprised within the age-groups increased with each succeeding age-period.

⁵⁷Census, 1910, bulletin, Agriculture: United States, *Age of Farmers*, 25; 1900, V, 727; and 1890, *Farms and Homes*, 618.

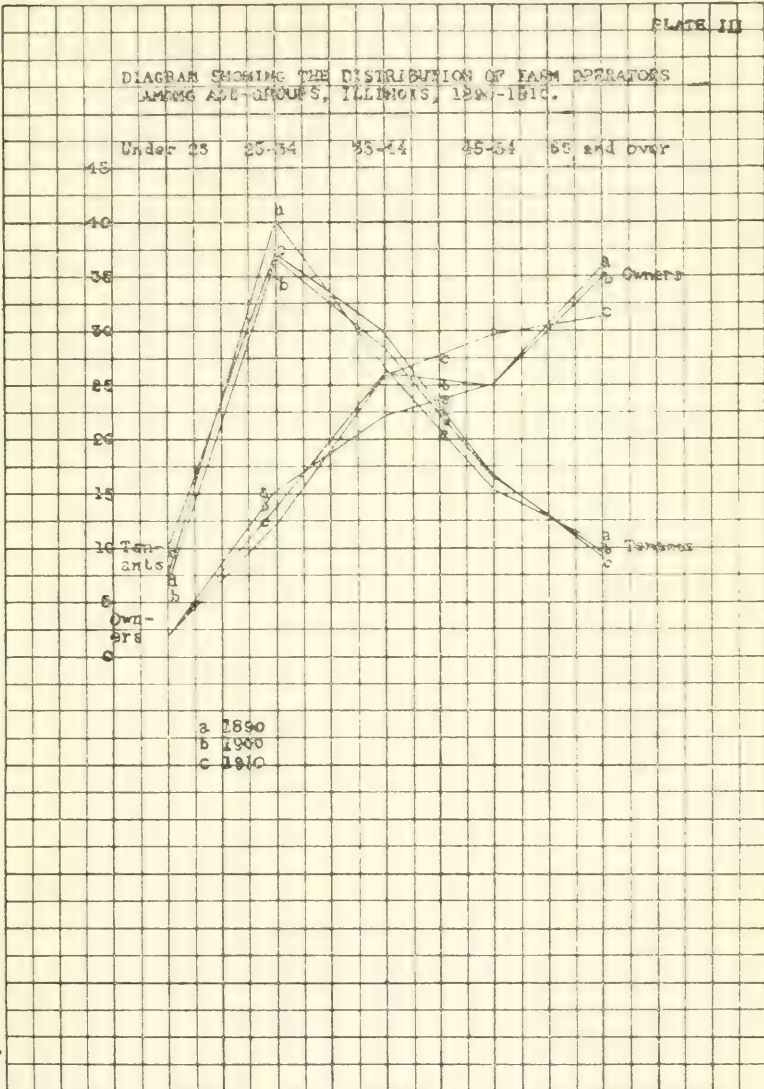
⁵⁸Including part owners in this series of statistics.

⁵⁹See also Taylor, H. C., *The Place of Economics in Agricultural Education and Research*, 108-110.

⁶⁰The census of 1910, the only one giving such statistics, affords evidence that the age of the operator seems also to have something to do with the basis on which he rents land. While 35.8 percent of the operators in all age-groups rented on a cash basis, the percentage varied as follows: under 25 years, 26.2; 25 and under 35 years, 34.4; 35 and under 45 years, 38.0; 45 and under 55 years, 38.2; 55 and under 65 years, 37.8; and 65 years and over, 42.8. (Census, 1910, bulletin, Agriculture, United States, *Age of Farmers*, 25).

This evidence points to an improvement in the economic and technical status of tenants as their years advance.

In the case of tenants the percentage comprised within the age-group, 25 to 34, was greatest, and declined steadily with the succeeding age-periods. It is evident, therefore, that youth is much



more characteristic of the tenants than of the owners, and that age seems to increase the chances for ownership.

The percentage of farm operators under 25 years of age who owned their land was 27 in 1890, 23 in 1900 and 17 in 1910. The percentage of operators 55 years old and over who rented their places was 14 in 1890, 15 in 1900 and 17 in 1910. It seems that ownership among younger farmers has been declining and that tenancy has been increasing among older operators. Apparently, the period of tenancy through which many farmers must pass on their way to ownership has been growing longer. This is especially true since 1900.

The age of owners free from mortgage encumbrance and of those having mortgages on their places is likewise shown by data for the last three census dates. Although the basis of the data is somewhat different on the various occasions, the difference is so slight as to be practically negligible in this sort of a comparison.

THE PERCENTAGE OF OWNERS IN EACH AGE-GROUP OWNING THEIR PLACES FREE AND ENCUMBERED, ILLINOIS, 1890-1910.⁶¹

Age-period	Percentage of owners					
	Free			Encumbered		
	1910	1900	1890	1910	1900	1890
Under 25 years.....	24.2	56.7	63.4	65.8	43.3	36.6
25 and under 35 years.....	28.0	48.6	51.0	72.0	51.4	47.0
35 and under 45 years.....	36.3	50.6	56.0	63.7	49.4	43.1
45 and under 55 years.....	46.4	58.1	61.4	53.6	41.9	38.6
55 years and over.....	65.1	69.3	72.5	34.9	30.7	27.5
55 and under 65 years.....	58.6	65.3	.....	41.4	34.7	.....
65 years and over.....	74.7	74.5	.....	25.3	25.5	.....
Total.....	47.2	58.6	63.2	52.8	41.4	36.8

It appears that, in general, freedom from mortgage encumbrance increased with advancing age. Those under 25 years old were exceptions to the general trend, because, doubtless, in many cases they were heirs who had received their land clear of indebtedness. The age-period, 25 to 34, however, was one during which the percentage of mortgage encumbrance was very heavy. At each census the succeeding age-period showed declining

⁶¹Census, 1910, bulletin, Agriculture: United States, *Age of Farmers*, 25; 1900, V, 727; and 1890, *Farms and Homes*, 618.

percentages of owners encumbered, indicating in most cases successful escape from indebtedness. The decline in freedom from encumbrance was more rapid between 1900 and 1910 than between 1890 and 1900.

The owners in the age-groups under 45 years were relatively less free from mortgage encumbrance at the later census dates than those in the age-groups 45 years and over. The decade, 1890 to 1900, was one of relatively little change, while that following 1900 was one of decided decline in the case of all ages under 55 years. It appears, therefore, that the period required for removing mortgage incumbrance from farms has been lengthened in Illinois.⁶²

SUMMARY

By way of summary the following are the outstanding facts relative to farm operators in Illinois. The farmers operate chiefly as heads of families. Share tenants has been more prevalent than cash tenancy, though cash tenancy predominates in the Northern part of the state and has been more characteristic of tenants who were advanced in years and who were operating farms whose owners were resident at a considerable distance from their farms. The farms of medium size were chiefly cultivated by tenants, while the largest and smallest farms were most characterized by operation by owners. There was a tendency toward the cash basis in the case of farms under 500 acres, and toward the share basis in the case of those over 500 acres. During the ten years, 1900 to 1910, the farms of owners proper declined in size, and those of tenants underwent a decided increase due, probably, to the decline in ownership in the districts of larger farms. The tenants were in charge of more than their proportion of the improved acreage.

The farms of no single form of tenure can be held to be superior in all ways. Managed farms had the highest value in buildings and live stock per acre, and farms of owners were characterized by the highest value of implements and machinery per acre. In values of domestic animals the farms of tenants were below the average, when either the total value or the value

⁶²A certain amount of evidence on this point is afforded by the fact that there is growing discontent among bankers with the practice of renewing mortgages, and an agitation for lengthening the period of mortgages in Illinois. See Stewart, C. L., *An Analysis of Rural Banking Conditions in Illinois*, 13, 14, 20, 21.

per head is considered. The farms of tenants were largely devoted to the production of the money crops. This was particularly true of share tenant farms. Yields were superior in the case of farms operated by managers and by cash tenants.

Operating owners have shown little tendency to increase the mortgages on their farms since 1900, and the rate of increase of the equity has greatly exceeded that of the indebtedness.

The farms were mostly in the hands of white farmers, with a decreasing percentage of foreign-born. This decrease may be due to the ability of the foreign-born to pass the ownership of their land to children born in this country.

The owners of rented farms in 1900 were resident in the state in about nineteen cases in twenty, and in three cases out of four were resident in the same county in which the farms were located.

Concentration in the ownership of rented farms is seen in the fact that in 1900, 1.16 per cent of the owners of rented farms were in possession of 7.78 per cent of the rented farms, comprising 7.87 per cent of the acreage and 8.74 per cent of the value of rented farms.

It was shown by the age statistics that young operators were more generally characterized by tenancy, especially on the share basis, and that young owners were most heavily encumbered. Advancing years tended to replace share with cash tenancy, tenancy with ownership, and encumbrance with freedom from mortgage debt. The latest census data, however, indicate that an influence is at work restraining this movement.

CHAPTER V

THE RELATION OF TENURE TO RURAL ECONOMIC AND SOCIAL CONDITIONS IN ILLINOIS

The tenure of land in Illinois is closely related to a number of prevailing tendencies having a political and social significance. Not least important of these tendencies is the change in the number of people living on the farms of the state.

THE DECLINE IN RURAL POPULATION

The existing data make it difficult to get accurately at the decline in rural population in Illinois counties. Data are afforded for the incorporated places in the entire state and for the total population of each county. "Unincorporated population," of course, is not to be identified with "farm" population. Some farm operators and laborers live in incorporated places. Some of those dwelling outside of incorporated places follow a line of occupation in cities, some others are engaged in exploiting mineral wealth, such as coal, oil, and gas, and a few conduct country shops and stores. Whether the absolute figures for the unincorporated population approach closely the actual farm population is hard to say. It is probable, however, that the change in the unincorporated population is not greatly different from the change in the actual farm population. The incorporation of places has been more completely accomplished at the later dates, but an inspection of the statistics shows this source of declining unincorporated population to be of slight importance. Moreover, the place held in the unincorporated population by miners and others occupied in non-agricultural pursuits has probably been an increasing one. All things considered, therefore, the change in the number of people dwelling outside of incorporated places may be regarded as a fair index of the change in farm population.

During the twenty years, 1890 to 1910, there was a decline in the unincorporated population of 87 counties and an increase in 15 counties. The decline in the state as a whole was 7.2 per cent. The following table shows this change somewhat more in detail.

THE NUMBER OF COUNTIES IN WHICH THE UNINCORPORATED POPULATION INCREASED AND DECREASED, BY GEOGRAPHIC DIVISIONS, ILLINOIS, 1890-1910.

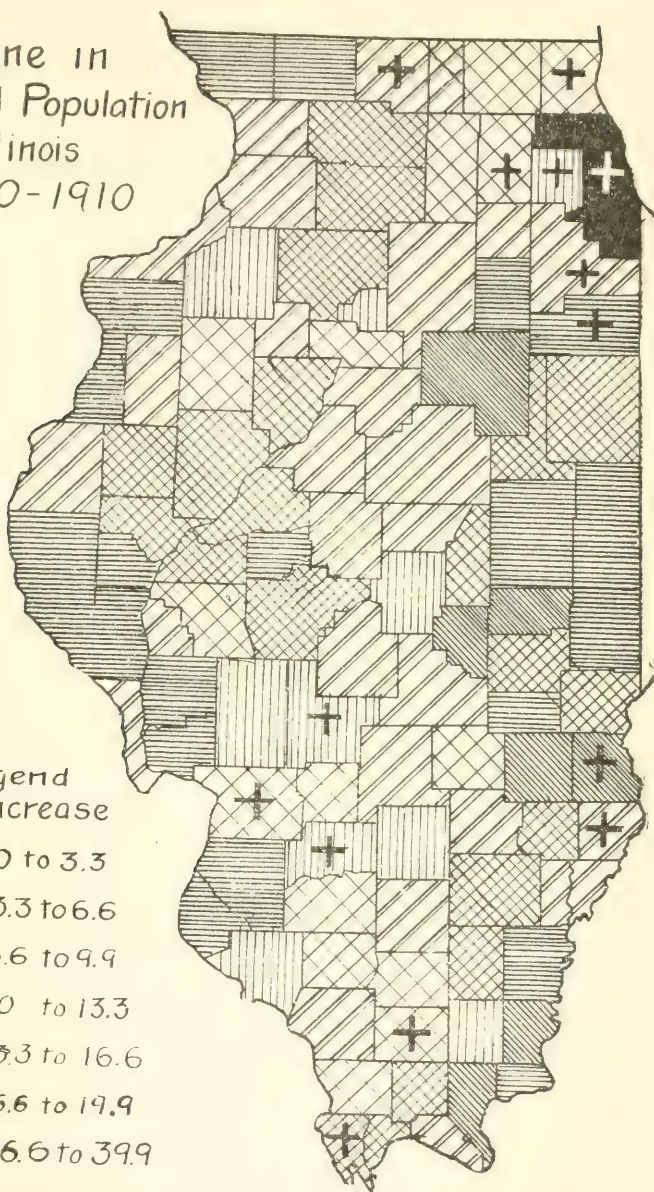
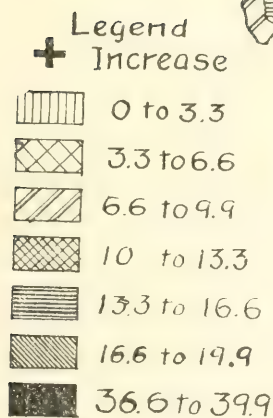
Period	The state		Divisions					
			Northern		Central		Southern	
	Inc.	Dec.	Inc.	Dec.	Inc.	Dec.	Inc.	Dec.
1890-1910	15	87	7	17	1	36	7	34
1900-1910	14	88	7	17	0	37	7	34
1890-1900	35	67	11	13	5	32	19	22

It is apparent that during each of the two decades the unincorporated population was declining in most of the counties. In the state as a whole, the decline was 1.6 per cent between 1890 and 1900 and 5.7 per cent between 1900 and 1910. The unincorporated population of the counties of Central Illinois showed the least tendency to increase during either decade of the period. The proportion of counties in which an increase took place between 1890 and 1900 was largest in Southern Illinois, and between 1900 and 1910 was largest in Northern Illinois. In 9 of the 14 counties in which an increase took place in the unincorporated population between 1900 and 1910 an increase had occurred during the preceding decade. Of these 9 counties 5 were within a radius of 50 miles of a large city, 3 were marked by the development of mineral resources, and 3 were river counties in which the farm area was being expanded during the period following 1890. Of the 5 other counties in which the unincorporated population increased between 1900 and 1910, 3 were adjacent to large cities.

The increase in unincorporated population appears, therefore, to have been due in large measure to exceptional conditions, such as proximity to large urban centers, the inclusion of new farm land, and the exploitation of mineral wealth by people who were enumerated as resident outside of incorporated places. Urban centers exert their influence not only by giving a more intensive tone to the agriculture, but also by filling the surrounding country with residents who belong rather to the city than to farm population.

It is important to observe, first, the relation of the population actually engaged in agriculture to the total unincorporated population. The population actually engaged in agriculture increased from 430,134 in 1890 to 444,242 in 1910. In 1900 it stood at 461,014. Though the decline in the number engaged in

Decline in
Rural Population
Illinois
1900-1910



agriculture may have helped to account for the decline in unincorporated population after 1900 it could not account for the decline between 1890 and 1900.

The number of people dwelling outside of incorporated places in excess of those actually engaged at farming was 1,206,081 in 1890, 1,149,540 in 1900, and 1,074,022 in 1910, a decrease of 132,059 in the twenty years. While the number actually occupied at farming increased 3.3 per cent during the two decades, the rest of the unincorporated population declined 11.0 per cent. The percentage of the unincorporated population actually engaged in agriculture was 26.4 in 1890, 28.8 in 1900 and 29.4 in 1910. It is suggested, therefore, that a part of the rural decline is due to such causes as reduction in the size of families, removal or disappearance of persons not occupied at any line,¹ and the reduction in the relative number occupied at other than agricultural pursuits while resident in the country.

The number actually engaged in farming would be still larger in Illinois but for the fact that improvements in machinery make it possible for an individual to cultivate a large area. The acreage of all farm land per individual actually engaged in farming in Illinois was 71.2 in 1890, 71.4 in 1900 and 73.5 in 1910; or, considering improved acreage only, 60.0 in 1890, 60.3 in 1900, and 63.4 in 1910. There can be no doubt that the land is being farmed with less human labor.

The change in rural population thus appears to be more a symptom and consequence of general economic changes than a causal factor. It is probable, however, that the readjustments in rural population have at least offered occasion for, and often have been causes affecting the prevalence of particular forms of tenure. The movement of owners to the city has doubtless led to a larger portion of the land owned by them being rented, both before and after the title changes to their heirs. The movement of farm families has doubtless been accompanied by the enlargement of areas of operation, if not by the growth of holdings.

The changes in tenure have contributed not so much to reduce the number of unincorporated inhabitants as to change the composition of the rural population.

¹The percentages of the total population occupied in Illinois in 1890 was 35.4; in 1900, 37.4; and in 1910, 40.7. See above, p. 35.

CO-OPERATIVE ENTERPRISE AND RURAL INSTITUTIONS

The relation of tenure to co-operation in Illinois is a subject on which there is as yet very little data. The most important forms of farm mutual or co-operative business organizations now existing in the state are the co-operative creameries, grain elevators, mutual insurance and telephone companies, and county agricultural improvement associations. The elevators are found, for the most part, in the districts where tenants are most numerous. In the case of creameries and county associations, which are located chiefly in the Northern counties, the tenants in the surrounding districts are not so numerous as in the Central part of the state, but their numbers have been increasing with great rapidity. Neither instance, however, establishes a dependence of co-operation on tenancy. The territorial association between the prevalence of tenancy and the number of co-operators is a negative one in the case of mutual insurance companies, and this is probably true also in the case of mutual telephone companies.

The territorial association or dissociation of tenant farming with the existence of co-operative organizations can, however, be little more than suggestive. In nearly all parts of the state there are enough owners within proper radius to form the nucleus of any kind of co-operative organization thus far developed in the state. On the other hand, it cannot be said without claiming too much that co-operation has brought such prosperity as to have enabled tenants, in any large degree, to become owners of land formerly rented in the vicinity.

That tenants, changing from farm to farm at more or less short intervals, should generally be more active and successful than owners in building up co-operative organizations is hardly in the line of reason. It is a somewhat striking fact, however, that one of the most successful advocates of farmers' elevators in the state has been and still is a tenant farmer. The fact remains, nevertheless, that the shifting of tenants injures their ability to promote co-operative organizations and thereby deprives them of their share of the advantages which might otherwise accrue to them. This is probably less true where the co-operative organizations, such as farmers' elevators, have forced prices in the direction favoring the farmers, for all farmers, regardless of their term of operation in a particular vicinity, get the advantage of the more favorable prices so

long as within range of markets dominated by the quotations of the co-operative organizations.

If, in the future, co-operation assumes forms requiring greater permanency of membership in the societies, greater intimacy of acquaintance among the members, or greater investment per member, the tenants will doubtless find themselves handicapped in their relation thereto.

Other features and institutions of rural life probably suffer as much or more than co-operative societies from the replacement of owners by tenants. On the whole, the tenants cannot do as much toward stimulating business as the owners might. A part of the negligence of the rural schools can be traced to the absenteeism of landowners. The shifting of tenant families gives rise to problems for the county church, taking members of various sects and denominations into communities where their religious views are not represented in an organized communion, and cutting off the chance for the development of deep friendships and associations which give vitality to church life. Church and school finances must naturally suffer from the displacement of better-to-do landowners by tenants struggling to get an economic foothold. The relation of tenancy to the education and social life of the rural population and to the vitality of religious organizations deserves much more thoroughgoing investigation than has yet been given it.²

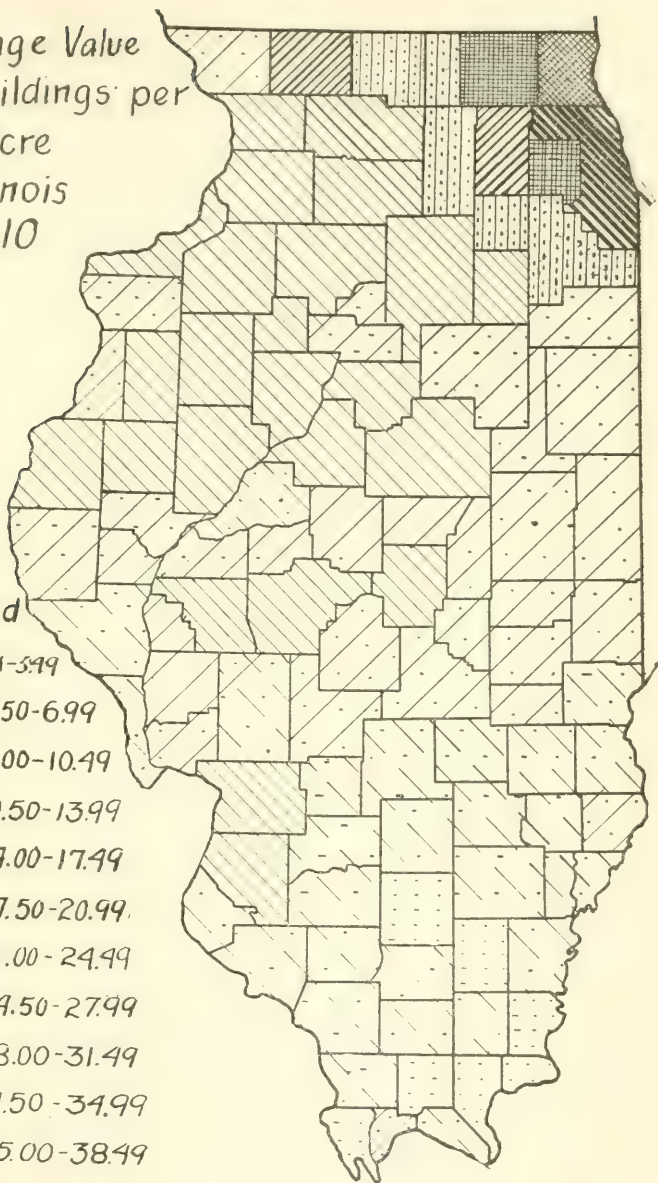
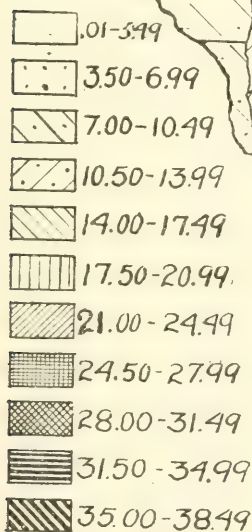
EQUIPMENT IN FARM BUILDINGS

A map is presented showing the average value of buildings per acre of improved land in Illinois in 1910. It is apparent that the sections where values were relatively highest were the sections where land was only slightly above the average in value. Where land was highest the value of buildings per acre was near the state average. In Southern Illinois the value of land and of buildings per acre were less than in the rest of the state. In the vicinity of cities the value of buildings seems to be higher, due in part to the greater number of farms in a given area, in part to the greater need of buildings on farms producing for a local market, and in part, perhaps, to the radiation from the cities of ideals in the architecture of residences. In the dis-

²See [Adams, C. S.] *A Rural Survey in Illinois*, 1911, and Rankin, F. H., Report on "General Conditions in Rural Communities," in the *Report of the Commission on Rural Problems and the Relation of the Young Men's Christian Association to their Solution*, 1912.

Average Value
of Buildings per
Acre
Illinois
1910

Legend



tricts where tenant farming was most prevalent the value per acre of buildings was small, and from 1900 to 1910 increased at no more than the average rate. This may be traceable in part to the abandonment of buildings on some patches of ground rented to part owners and to a tendency for tenant farms to suffer from lack of concern on the part of the landlord for the buildings with which his tenant has to do.

CONCENTRATION ON CEREAL PRODUCTION

In 1879 the greatest concentration on cereals in any part of the state was in the Southern and Southwestern counties. In 1889 the percentages in Central Illinois were tending in general to surpass those in Southern Illinois. In 1899 and in 1909 these tendencies had gone still farther. In Northern Illinois there was greater concentration on the cereals in 1899 than in 1889 or 1879. In 1909, however, the percentages as a whole showed a tendency to diminish.

It seems, therefore, that the movement toward concentration on cereal production has been most persistent and has gone to the greatest extremes in the districts where a large portion of the land is leased; that in the districts where ownership has been most persistent there has been a movement away from specialization in the cereal crops; and that even in Northern Illinois, where the percentage of tenancy has not been much above the state average, there was a decided trend toward cereal production during the period when tenants were multiplying most rapidly in that part of the state. It is apparent that there has been a strong emphasis on the production of corn in the original prairie districts of the state. It would be hard to say to what extent tenant farming is responsible for this. The fact that with the increase in tenant farming the emphasis does not seem to have been materially increased leads one to think that the land may be rented fully as much because it is corned as that it is corned because of being rented. It is probable, however, that with so much land operated under lease operators would be slow to make any material reduction in the acreage devoted to raising a crop the returns from which are so sure and so immediate.

TENANCY AS A SYMPTOM AND AS A CAUSE

In the agricultural economy of Illinois fundamental physiographic conditions are very important. The importance of their

influence on settlement and on early conditions of land tenure is generally admitted. That the influence of physiographic conditions has not diminished, but that it has perhaps increased with the advent of machinery and market economy is one conclusion reached in this thesis. In the dynamic changes that have taken place, the districts have gained much or little, or lost little or much, according as they compared favorably or otherwise with other districts at the start. The differences between sections of Illinois have been widening on nearly all bases of comparison, and these differences may usually be found to have a physiographic basis.

The importance of renting as a causal factor is emphasized in this investigation. Its significance as a symptom or accompanying phase has been pointed out by nearly every economist who has written upon tenancy. The belief is urged here that renting may promote a restraint in agricultural production, and may supply a sort of pension to encourage an uneconomic attitude toward their investment on the part of some owners of farm land. In the case of land that produces crops the area of possible or profitable production of which is not subject to expansion as rapidly as demand for those crops increases, farming may assume some of the characteristics of monopoly. The concerted action necessary for the realization of monopoly advantage is brought about, not by conscious compact, but unconsciously through ignorance of, inability or indisposition to employ sound methods of agriculture. To the extent that tenants are inefficient it may be said that renting reduces the supply of agricultural produce, raises prices of produce, increases the profits from raising it, and enhances land values. The statement of Adam Smith that "rent enters into the composition of the prices of commodities in a different way from wages and interest"³ may not, under present-day conditions, be quite as unfounded as the critics maintain, for rents determine the amount of renting, and, so far as they are exorbitant, doubtless incite the tenants toward more exhaustive methods.

The changes in the economic conditions of Illinois agriculture appear to have taken place with a sort of periodicity. A decade of great change was followed by one of little change,

³Smith, Adam, *Wealth of Nations*, (Buchanan edition), Vol. I, 243. See also, Walker, Francis, *Land and Its Rent*, 27; and the debate between Carlton, F. T., and Haney, L. H., in the *Quarterly Journal of Economics*, XXIV, XXV and XXVI.

and that by one of greater change in the case of a number of the phenomena of agriculture to which reference has been made in this thesis. It appears, moreover, that to a certain extent the practice of renting has been stimulated by both phases of the periodic movement.

RISING LAND PRICES AS A HANDICAP TO POPULAR OWNERSHIP AND GOOD FARMING

In the advances that have occurred the landless farmers have not shared equally with the landed farmers. The speculative element in land values has been a decided handicap to those without land. Owners hold the land at a value capitalized at a rate below that at which money may be borrowed for the purchase of land. The greater the discrepancy between the two rates the smaller is the portion of the market value for which a mortgage loan can be negotiated on the purchased land. As a consequence of these conditions the opportunity for tenants to acquire land has been greatly reduced.

Whether reduced loan rates would enlarge the expectancy of ownership for those entering agriculture without land is a question. Within certain limits the reduction of loan rates would probably reduce the rate at which the value of land would be capitalized, and thus stimulate the transfer of land. The consequence would be a rise in land prices, not only because of the greater demand for land but also because of the expectation of future increment in value. Since, however, the rate at which land is capitalized depends not only on rates of return in agriculture, but also on rates of return in business in general, it is probable that farm loan rates could be reduced so as to be brought nearer to the rate at which land prices are capitalized. To the extent that this is possible, a reduction in loan rates would probably assist the landless in acquiring land, especially in the districts where land is highest in price. The cheaper loans should be available to those who give evidence of becoming or remaining actual farm operators.

The prominence of land values in discussions of tenant farming leads logically to a discussion of proposals to control land prices. For the most part the upward movement in the prices of farm lands in Illinois was not a rapid one between 1860 and 1900. Increment could not have played a prominent part in the calculations of land owners. Land was owned chiefly by those who contributed much to the developments which produced the rise in land prices. From about 1900 on, however,

a somewhat different condition has been prevailing. During the recent period the rise in land prices came without regard to the contribution made by the owners to the agriculture of the country. The districts where land prices have moved forward most have been those in which small expenditures need be made by owners for fertilizers and improvements. It would seem, therefore, that some method of making the rise in land prices reward the public would have been preferable during the period of phenomenal price increments. A tax of 25 per cent of the increment in the case of land bought in 1900 at \$80 an acre and sold in 1910 at \$200 would have yielded \$30. If one-eighth of such land had been transferred and taxed, the proceeds would have been \$2400 a section, or nearly \$10,000 a school district. The expenditure of half this amount, \$500 a year, within the school district, for roads, schools, and other public purposes would have been a considerable factor in rural improvement. The other half, if devoted to general tax purposes in the county, state and nation would have been of great fiscal usefulness. Not least of all advantages that might have come from such a scheme, however, is that of repressing speculation in land. The tendency for longer association of owners with their land, on which a premium would thus have been placed, would have done something to combat the practice of short leases and of temporary association with the land on the part of tenants.

Whether a tax on the increment is desirable now is another question. It is pretty certain that agitation for such a tax cannot be expected to be strong among land owners so long as the increment is accruing strongly in their sections. For that reason it seems probable that increment taxation may not be expected at the time when it might be most effective as a check on land speculation.

THE OUTLOOK

With land prices at the present stage it seems likely that the increment element must become less important and the rental element more important in the calculations of land owners. When the annual increment is \$10 on land valued at \$100, based on a net rental return of \$6 capitalized at 6 per cent, the increment is the source of five-eighths of the addition to the landlord's income and wealth during the year. If, however, the annual increment is the same amount, \$10, on land valued at \$200, based on a net rental return of \$10 capitalized at 5 per cent,

the increment is the source of one-half of the addition to the landlord's income. The tendency for the interest rate to fall is responsible for the failure of the increment to decline even more rapidly in importance in the calculations of the land owner. That the interest rate will fall as rapidly on account of the expectancy of future rise in land prices is less likely the higher the stage of land prices. An annual increment of \$10 in the case of \$100 land is 10 per cent on the investment and in the case of \$200 land is 5 per cent. We may expect, therefore, that anticipation of future rise in value will exert a smaller influence both on the rate at which land is capitalized by owners and on the annual income or addition to the wealth of the land owner.

Because greater emphasis must fall on the rental as a source of return on the high priced lands, we may probably expect a pressure by land owners for higher rents. This pressure has already been exerted in some cases. An intensified selective process is thus made operative. The demand for efficiency falls upon farmers of all tenures.

Farming efficiency in the future, however, will probably consist to a greater extent in the ability to increase net profits through co-operative dealing with the market. The efficiency test must, therefore, rule more strongly against operators of the tenures whose characteristics are opposed to successful co-operative effort on their part.

It is not necessary, however, that the farmers of other tenures operate as efficiently as the owners themselves would operate. If owners prefer to have their land operated by others than themselves, and if their holdings are sufficiently large, they may content themselves with the financial disadvantage resulting from their refusal to operate their own land.

The coming of the automobile and improved roads and the extension of rural delivery routes and of telephones may remove the main disadvantages of rural residence. Improved opportunities of applying business methods in agriculture with a favorable reaction on profits will doubtless attract people of better training and experience into the operation of farm land.

The test of productive efficiency may be somewhat slow in acting and costly but it bids fair in the long run to penalize unsound farming regardless of the tenure of the operators, and to guarantee, therefore, the survival of the best forms of tenure and of the best individual operators.

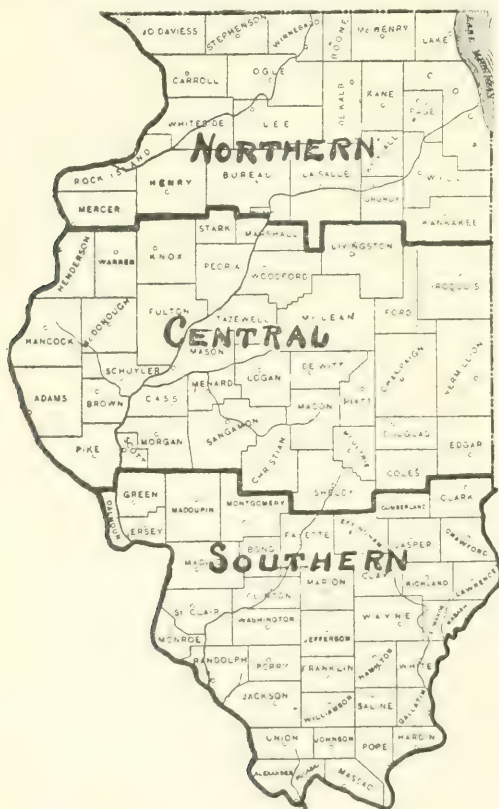
APPENDIX

The United States census bureau supplied unpublished data by means of which the author calculated the percentages that follow.

I. The percentage of the farm acreage operated by part owners under lease, and under deed, by counties, Illinois, 1910: Adams, 7.5, 11.0; Alexander, 1.9, 4.0; Bond, 8.4, 15.4; Boone, 3.5, 3.5; Brown, 7.7, 11.6; Bureau, 6.5, 7.4; Calhoun, 6.1, 10.2; Carroll, data incomplete; Cass, 6.7, 8.9; Champaign, 9.0, 8.9; Christian, 8.3, 8.9; Clark, 10.3, 13.7; Clay, 9.6, 14.9; Clinton, 7.5, 14.3; Coles, 7.7, 8.2; Cook, 5.3, 4.2; Crawford, 10.4, 13.3; Cumberland, 14.6, 17.7; De Kalb, 3.9, 4.9; De Witt, 8.7, 7.5; Douglas, 8.9, 8.8; Du Page, 1.6, 1.4; Edgar, 11.7, 9.7; Edwards, 14.8, 24.3; Effingham, 9.3, 17.7; Fayette, 12.2, 17.8; Ford, 5.6, 5.3; Franklin, 9.4, 13.9; Fulton, 5.5, 6.9; Gallatin, 10.6, 13.9; Greene, 9.6, 11.4; Grundy, 6.4, 7.7; Hamilton, 8.8, 15.6; Hancock, 9.1, 11.5; Hardin, 1.9, 4.6; Henderson, 8.3, 9.1; Henry, 5.2, 6.2; Iroquois, 7.4, 7.2; Jackson, 8.1, 11.8; Jasper, 13.5, 21.8; Jefferson, 8.0, 15.0; Jersey, 9.6, 12.2; Jo Daviess, 3.0, 5.0; Johnson, 4.6, 9.6; Kane, 1.6, 2.2; Kankakee, 8.0, 8.6; Kendall, 4.0, 4.5; Knox, 7.4, 8.2; Lake, 5.0, 6.3; La Salle, 6.5, 6.8; Lawrence, 10.2, 10.8; Lee, data incomplete; Livingston, 7.4, 7.8; Logan, 5.8, 5.6; McDonough, 8.1, 8.5; McHenry, 1.7, 2.3; McLean, 7.8, 7.3; Macon, 8.0, 7.6; Macoupin, 8.5, 11.5; Madison, 6.7, 10.3; Marion, 10.4, 17.6; Marshall, 7.7, 9.2; Mason, 8.0, 7.9; Massac, data incomplete; Menard, 9.8, 8.8; Mercer, 5.7, 6.3; Monroe, 10.1, 17.9; Montgomery, 8.4, 11.7; Morgan, 10.4, 10.5; Moultrie, 10.2, 9.7; Ogle, 5.3, 6.0; Peoria, 8.1, 9.0; Perry, 8.1, 12.5; Piatt, 7.5, 6.9; Pike, 8.4, 8.6; Pope, 4.0, 7.4; Pulaski, 7.5, 9.2; Putnam, 8.9, 8.7; Randolph, 8.1, 11.6; Richland, 10.2, 16.0; Rock Island, 5.0, 6.1; Saline, 7.2, 13.5; Sangamon, 10.2, 9.7; Schuyler, 7.9, 12.3; Scott, 9.8, 12.6; Shelby, 10.0, 11.6; St. Clair, 6.7, 9.1; Stark, 6.6, 8.9; Stephenson, 4.9, 6.6; Tazewell, 7.3, 8.2; Union, 5.9, 10.0; Vermilion, 9.4, 7.7; Wabash, 9.6, 10.2; Warren, 9.3, 9.5; Washington, 7.3, 13.8; Wayne, 9.0, 16.6; White, 9.6, 11.5; Whiteside, 3.8, 4.3; Will, 6.8, 7.5; Williamson, 6.9, 10.3; Winnebago, 4.1, 4.4; and Woodford, 8.6, 6.3.

II. The percentage of the farm acreage operated under lease by tenants and part owners, and under deed by owners proper and part owners, by counties, Illinois, 1910: Adams, 39.9, 58.9; Alexander, 41.1, 56.2; Bond, 44.0, 55.4; Boone, 56.4, 43.0; Brown, 36.9, 62.9; Bureau, 55.7, 41.2; Calhoun, 37.6, 59.5; Carroll, data incomplete; Cass, 48.0, 51.2; Champaign, 66.2, 32.7; Christian, 66.2, 32.3; Clark, 38.6, 60.9; Clay, 34.1, 63.4; Clinton, 54.4, 44.8; Coles, 56.0, 42.0; Cook, 50.5, 46.5; Crawford, 40.1, 58.7; Cumberland, 40.6, 58.1; De Kalb, 58.0, 40.3; De Witt, 68.6, 29.6; Douglas, 61.1, 36.3; Du Page, 53.2, 44.6; Edgar, 58.3, 40.1; Edwards, 31.3, 68.2; Effingham, 30.4, 69.1; Fayette, 43.0, 56.2; Ford, 75.3, 23.7; Franklin, 34.1, 64.5; Fulton, 47.9, 50.3; Gallatin, 50.8, 48.4; Greene, 47.0, 48.2; Grundy, 67.3, 31.4; Hamilton, 32.0, 56.0; Hancock, 46.4, 51.9; Hardin, 21.6, 77.8; Henderson, 48.5, 50.0; Henry, 56.6, 41.6; Iroquois, 66.5, 30.4; Jackson, 42.4, 45.3; Jasper, 36.1, 63.1; Jefferson, 31.8, 67.4; Jersey, 47.3, 51.1; Jo

Daviess, 29.5, 69.4; Johnson, 22.2, 74.0; Kane, 54.2, 42.2; Kankakee, 53.0, 44.3; Kendall, 56.3, 42.3; Knox, 54.7, 42.0; Lake, 41.8, 50.8; La Salle, 58.2, 41.2; Lawrence, 36.7, 51.7; Lee, data incomplete; Livingston, 68.2, 31.0; Logan, 72.4, 26.9; McDonough, 53.5, 44.9; McHenry, 50.3, 47.1; McLean, 65.0, 32.4; Macon, 68.5, 29.4; Macoupin, 51.5, 47.1; Madison, 51.0, 48.3; Marion, 32.9, 65.4; Marshall, 68.3, 31.4; Mason, 66.8, 32.8; Massac, data incomplete; Menard, 56.4, 43.2; Mercer, 47.8, 50.1; Monroe, 50.1, 49.4; Montgomery, 51.6, 47.2; Morgan, 51.8, 47.0; Moultrie, 60.2, 38.7; Ogle, 57.8, 40.2; Peoria, 50.3, 48.1; Perry, 35.8, 62.3; Piatt, 62.8, 29.7; Pike, 45.7, 52.2; Pope, 23.4, 75.9; Pulaski, 37.8, 61.7; Putnam, 59.4, 39.6; Randolph, 41.8, 58.0; Richland, 32.2, 66.0; Rock Island, 44.6, 53.2; Saline, 34.8, 62.9; Sangamon, 60.8, 37.4; Schuyler, 43.5, 54.3; Scott, 49.1, 49.0; Shelby, 51.7, 46.7; St. Clair, 54.4, 45.3; Stark, 54.0, 44.6; Stephenson, 43.3, 55.9; Tazewell, 59.4, 38.5; Union, 38.5, 59.1; Vermilion, 63.2, 34.8; Wabash, 44.9, 54.9; Warren, 56.5, 38.3; Washington, 43.7, 55.6; Wayne, 31.0, 67.5; White, 46.6, 53.0; Whiteside, 60.5, 37.8; Will, 49.2, 49.9; Williamson, 35.2, 64.1; Winnebago, 49.7, 49.1; and Woodford, 61.1, 37.9.



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- Annals. Annals of the American Academy of Political and Social Science, Philadelphia.
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A. H. A. American Historical Association Publications, Washington.
A. S. A. American Statistical Association Publications, Boston.
J. P. E. Journal of Political Economy, University of Chicago.
J. S. S. Journal of Statistical Society, London.
P. S. Q. Political Science Quarterly, Boston.
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Mine Taxation in the United States

LEWIS EMANUEL YOUNG

PREFACE

This study is presented as a report upon the experience of the important mining states in the taxation of mines and mineral lands. The investigation of the historical data and of the laws was begun in 1910 and an effort has been made to include all important material published prior to November 1916. While there have been many important contributions to the literature of particular phases of mine taxation and of appraisal of mining property for the purpose of taxation, this study is probably the first publication which attempts to bring together data regarding the experience of the states in taxing mines and to compile the state laws affecting mine taxation.

It is essentially an historical statement and an explanation and comparison of methods employed in assessing and taxing mining properties. While the material may not be of service to either the economist who is an authority in taxation or to the mining engineer experienced in mine valuation it is hoped that it may serve to bring to a number of economists something of value from the field of mining, and to some of the mining profession, something helpful from the field of taxation.

Most of the introductory material comprising Chapter I might have been omitted if the thesis had been presented to mining men alone. Many mining engineers have little knowledge of the principles of taxation and several engineers have suggested that a brief statement of these general principles should be included. Owing to the fact that the volume of the material presented has greatly exceeded the limits originally proposed, it has been thought advisable to omit such a statement of principles and the engineer who desires to acquaint himself with the principles of taxation is referred to the well-known works of Professors H. C. Adams, C. C. Plehn, and E. R. A. Seligman.

The statement in Chapter I regarding the mineral resources of the United States is entirely inadequate to show statistically their importance but it was thought advisable to note briefly the geographical distribution of the producing mines and thus indicate the fact that the problem of mine taxation is not a local one nor limited to a few states.

In the statement of the experience of the various states only those states have been noted in which the practice has been different from the other important mining states or which have made several changes in the constitutional or statutory enactments affecting the taxation of mines.

It is to be regretted that so few data of taxes paid have been available for use in connection with the study of the tax burden on mines. Mining men generally may not be satisfied with the interpretation of the census statistics employed in Chapter VII but these have been used simply to give a basis for comparisons among the states and among different types of mines. The lack of data should indicate the necessity for the official collection and publication of statistics showing the tax burden on the mining industry.

No attempt has been made by the author to formulate an original plan for taxing mines and mineral lands. There are certain fundamental questions upon which there should be an agreement before any far-reaching revision of tax laws should be undertaken. Among the most important of these questions are the following:

1. Should natural resources be taxed in a manner or by a method different from other property?
2. Should natural resources be taxed at a higher rate if taxed in the same manner as other property?
3. Should wasting assets, such as mines, be taxed differently from other property?
4. Should the appraisal of mines for taxation be centralized, that is, placed under the immediate supervision of state officers?
5. Should mines be appraised physically for the purpose of taxation?

In the summary there is a brief statement of the conclusions of the author.

The thanks of the author are due various friends among the mining profession for suggestions and for the criticism of material, and he acknowledges his indebtedness to the members of the State Tax Commissions in all the mining states for their courteous criticism of copy and data. In several instances they have undertaken to examine the entire manuscript.

The author desires to acknowledge the helpful criticism and suggestions of colleagues in the University of Illinois and particularly of Professor E. L. Bogart under whose supervision the work was done.

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CHAPTER I

INTRODUCTION

The mineral industry of the United States had an output which was valued by the United States Geological Survey at two billion four hundred million dollars in 1913 and at two billion one hundred thousand dollars in 1914.¹ The average value per annum during the period 1909 to 1914 was approximately two billion one hundred million dollars. A large amount of capital is invested in the industry and in certain communities the mines comprise the principal form of wealth. In such districts and in those states in which mining is one of the leading industries the problem of the taxation of mines and of mineral lands has become of great importance.

During the last decade considerable attention has been directed to this subject by the taxing bodies of a number of states, and important legislation directly affecting the problem has been enacted in Pennsylvania, West Virginia, Ohio, Michigan, Wisconsin, Minnesota, Oklahoma, and in a number of the Rocky Mountain states.

It may be said that the agitation in regard to the taxation of mines has been due largely to:

1. The large dividends paid by a few mines.
2. The presumption that mines in general pay dividends at a much higher rate upon the capital invested than other industrial enterprises.
3. The ownership of mines by stock-holders residing outside the state or the district in which the mines are located.
4. The difficulty experienced by county and township officials in appraising mines and mineral lands.
5. The wide-spread popular notions regarding the public interests or the public rights in mineral resources.
6. The suggested methods of conserving mineral resources or regulating their use by means of taxation.
7. The general and increasing tendency to shift the tax burden to industries.

¹*Mineral Resources of the United States, 1914*, p. 29.

8. Tax reform movements in general.

9. Increased public expenditures.

It is the purpose of this study to assemble some of the available data regarding the history and the present methods of mine taxation, including the laws of the states, the regulations of tax officials, the rules and methods used in appraising mines for the purpose of taxation, and the statistics of taxes paid by different types of mines operating under the various state laws.

NATURE OF MINING PROPERTY

Definitions. The definitions of mining property have been developed largely through the acts, opinions, and decisions of Congress, of the various state legislatures, of the state and Federal courts, and of the various taxing officers and commissions. There is now but little difference of opinion in regard to the definition of such terms as mineral, mine, and mining right, and in the classification of the various kinds of mining property.

In the mining industry, "mineral" is now defined broadly to include "every description of stone and rock deposits, whether metallic substances or entirely non-metallic".² This definition would probably be accepted by most of the American and English courts. New York courts have recently held that "mineral" includes all inorganic substances.³ "Geologic bodies which consist mainly of a single useful mineral—for instance, beds of pure gypsum or coal—or which contain, throughout or in places, valuable mineral that can be profitably extracted—for instance, veins containing disseminated gold—are called 'mineral deposits'".⁴

The term "mineral land" has received considerable attention from the courts on account of the variety and the distribution of minerals found upon the public domain. Federal and state courts have finally agreed that the term has an economic rather than a strictly geologic or mineralogic meaning as used in the Federal statutes regulating the entry and the sale of the lands of the public domain. One of the most concise and illuminating definitions of "mineral land" has been developed by Curtis H. Lindley as follows:

²Northern Pacific Co. v. Soderberg, 99 Fed. 506, (1900).

³White v. Miller, 200 N. Y. 29, (1910).

⁴Lindgren, W., *Mineral Deposits*, p. 2. New York, 1913.

“The mineral character of the land is established when it is shown to have upon or within it such a substance as—(a) Is recognized as mineral, according to its chemical composition by the standard authorities on the subject; or—(b) Is classified as a mineral product in trade or commerce; or—(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—And it is demonstrated that such substance exists thereon or therein in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.”⁵

This definition contemplates the classification of land as either “mineral” or “agricultural” by the Federal Government depending upon its value for either mining or agriculture. It introduces the idea of both quality and quantity of minerals and the possibility of the profitable working of the minerals. This same idea is incorporated in a recent decision of the United States Supreme Court in which it is held that the term “mineral lands” includes “all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for the purpose of manufacture.”⁶ The Joint Committee on Tax Revision in Virginia in 1914 advised that mineral lands be defined by law to be “lands containing a workable seam or vein of mineral of commercial value.”⁷

Various of the state courts have adopted definitions as broad as those noted. For the purpose of taxation the state of Utah⁸ has included gypsum under the term “other valuable mineral deposits”; but in a recent appraisal of mining properties in Michigan it was agreed by the appraisers that deposits of salt, gypsum, limestone, brick-clay, and marl should not be appraised on a mining basis as “none of these materials is inherently valuable in the ground, its value depending entirely

⁵Lindley, C. H., *A Treatise on the American Law of Mines*, I, 174.

⁶*Northern Pacific v. Soderberg*, 188 U. S. 526, (1902).

⁷*Report of Joint Committee on Tax Revision*, p. 35, Richmond, 1914.

⁸*Nephi Plaster & Mfg. Co. v. Juab Co.*, 93 Pac. 53; 33 Utah 114, (1907).

upon the labor that is put upon it, or on its commercial situation".⁹

Formerly the term "mine" was used in a narrower sense than now. The idea of subterranean excavation distinguished a mine from a quarry. But with the extensive development of open workings the term came to include underground mines, open-pit mines, and quarries. Bouvier defines a mine as a "pit or excavation made for the purpose of obtaining mineral".¹⁰ In the broad sense this definition includes wells bored to secure minerals, quarries, and those excavations which are commonly called mines.

Sovereignty and mineral rights. Before the Revolution, in practically all grants of land there was reserved for the Crown a one-fifth interest in all gold and silver mines, following the theory that these minerals belonged to the Crown. The charter of North Carolina in 1584, which was granted to Sir Walter Raleigh, reserved "the fifth part of all the ore of gold and silver that might be gotten and obtained".¹¹ The grant by King James of a charter to Virginia included the right to explore for minerals from the 34th to the 45th parallel but reserved one-fifteenth of the copper as well as one-fifth of all gold and silver.¹² The later charters of Virginia¹³ and the charters of Massachusetts¹⁴, New Hampshire¹⁵, Maryland¹⁶, Maine¹⁷, Rhode Island¹⁸, Connecticut¹⁹, and Pennsylvania²⁰ made a reservation of an interest, usually one-fifth, in the gold and silver.

The United States courts held²¹ that the entire title to the minerals, including the royal title to gold and silver which had been reserved by the Crown in Maryland, passed to the State,

⁹Michigan State Board of Tax Commissioners, *Appraisal of Mining Properties of Michigan*, p. 76, 1911.

¹⁰Bouvier, J., *Law Dictionary*, p. 180, St. Paul, 1914.

¹¹Poore, B. P., *Charters and Constitutions*, II, 1380, Washington, 1877.

¹²Thorpe, *Federal and State Constitutions*, VI, 3784, Washington, 1909.

¹³*Ibid.*, p. 3796.

¹⁴*Ibid.*, pp. 1834, 1847, 1850.

¹⁵*Ibid.*, pp. 2434, 2437.

¹⁶Poore, *op. cit.*, II, 1271, 1274.

¹⁷Thorpe, *op. cit.*, III, 1627.

¹⁸Poore, *op. cit.*, II, 1602.

¹⁹Thorpe, *op. cit.*, I, 536.

²⁰Thorpe, *op. cit.*, V, 3036.

²¹147 U. S. 282, (1892).

“the interest of the proprietor by confiscation, and that of the king by conquest”.

Within the area included in the original thirteen states the Federal Government has held no public lands or title to minerals, but by the several cessions of the states a large tract west of the Alleghanies, containing valuable mineral deposits came under Federal control. Influenced by the idea that gold and silver should belong to the Crown, which idea had prevailed almost universally up to this time, the Continental Congress²² on May 20, 1785, in enacting laws regarding the public lands, reserved “one-third part of all gold, silver, lead, and copper mines to be sold or otherwise disposed of” as Congress should thereafter direct. This act continued in force until 1789.

In his plan for the disposition of the public lands presented to the first Congress in July 1791, Alexander Hamilton was silent on the subject of mineral lands.²³ On May 18, 1796, Congress in providing for the sale of the lands of the United States in the territory northwest of the Ohio River, directed United States surveyors to note the true location of all mines, salt licks, and salt springs. Certain salt lands in Ohio were reserved by Congress for the “future disposal of the United States”.²⁴ In 1803 Congress placed at the disposal of the President the sum of three thousand dollars for the purpose of developing the salt springs on the Wabash.²⁵

The leasing of lead lands and salt springs on the public domain was authorized by Congress on March 3, 1807.²⁶ These leases were not to run for more than three years.²⁷ The first leases under this law were issued in 1822 and the first lead in quantity was produced in 1826. The royalties and rents were difficult to collect and the entire system proved so unpopular that in 1834 the operators of the mines and smelters refused to make further payments.²⁸ The cession by the Chippewas of the Lake

²²I *Laws Relating to Public Lands*, 11.

²³*American State Papers*, I, 4.

²⁴I *United States Statutes at Large* 466.

²⁵2 *U. S. Statutes at Large* 235.

²⁶2 *U. S. Statutes at Large* 445.

²⁷The President was authorized to lease the lead mines of Indiana Territory for a term not exceeding five years. 2 *Statutes at Large* 448, (Mar. 3, 1807).

²⁸Whitney, J. D., *Metallic wealth of the United States*, Philadelphia, 1854.

Superior District on March 12, 1843, added that important mineral district to the public domain and a large number of leases were granted in that district in 1845, but the issue of these leases was discontinued in 1846. The United States courts had held that Congress has power to lease as well as to sell public lands.²⁹

Congress had previously, March 3, 1829, authorized the sale of lead mines reserved in the state of Missouri.³⁰ Other minerals of the public domain were still reserved from sale. On July 1, 1846, the lead mines and lands of Illinois, Arkansas, and the territories of Wisconsin and Iowa were opened to sale following the plan of the Missouri act.³¹ Finally, on March 1, 1847, Congress authorized the sale of lands containing "copper, lead, and other valuable ores after geographical examination and survey."³² The Chippewa lead lands were offered for sale March 3, 1847,³³ and the mineral lands of the Lake Superior District in 1850.³⁴

The pre-emption law of September 4, 1841, had excluded "all lands on which are situated any known salines or mines."³⁵

Up to this time no important deposits of gold or silver had been discovered upon the public domain and the Federal laws made no reference to these metals except incidentally and under the inclusive term of "mineral."³⁶ It was not until July 13, 1866, that Congress provided for the sale of gold and silver mines and lands.³⁷ Later, legislation was enacted providing for the sale of all types of mineral deposits upon the public domain. When the patent papers are issued the complete title to the surface and to the mineral rights is transferred to the citizen.

By the enactment of these laws the system of private ownership of mineral deposits has been developed in the United States. The Federal Government has completely surrendered its title to the minerals, and the mineral lands have passed to private ownership without any actual or implied reservation of

²⁹14 Pet. 526, (1840).

³⁰4 *Statutes at Large* 364.

³¹9 *Ibid.*, 37.

³²9 *Ibid.*, 146.

³³9 *Ibid.* 179.

³⁴9 *Ibid.* 472.

³⁵5 *Ibid.* 453.

³⁶Donaldson, *Public Domain*, Washington, 1884.

³⁷14 *Statutes at Large* 137.

a public interest greater than or different from the public interest in the mineral soils.

Chief Justice Field³⁸ said that in no instance has the United States "asserted any right to the mines as being reserved from the operation of the patents. The patent has uniformly been regarded as transferring all interests which the United States could possess in the soil and everything imbedded in or connected therewith. Whenever mines have been claimed, it has been as a part of the lands in which they were contained and when minerals have been reserved from sale or other disposition, it has only been by reserving the lands themselves. It has never been the policy of the United States to possess interests in lands in connection with individuals."

R. W. Raymond, an eminent American authority on mining law said, "The right of the land owner is supreme; and even when the Federal Government has legislated concerning mining titles it has done so for public lands only, and in its capacity as their owner, with the power, given to the land owner by the English common law, of separating the estate in minerals from the estate in soil and disposing of either upon any terms which it might dictate."³⁹

There has evidently been nothing in the history of the development of the mining customs or of the mining laws of the United States to warrant any assumption that the mining industry should be taxed upon a different basis from other industries operating upon property secured without reservation by complying with Acts of Congress.

Congress has enacted laws regulating the location of claims upon the mineral deposits of the public domain, but these laws are not effective in all the states. The public domain has never included any lands in the original thirteen states nor in Vermont, Kentucky, Maine, West Virginia, and Texas. The public land in Tennessee was granted to the state by the United States. The public lands in Ohio, Indiana, Illinois, and Iowa were largely disposed of before the enactment of the general mining laws. The lead lands of Illinois, Iowa, Arkansas, Missouri, and Wisconsin and the lands of Michigan, Minnesota, and Wisconsin valuable for copper and iron were sold under special laws. All the public lands in Oklahoma were declared to be agricultural; however, the federal mining laws have been extended by Congress

³⁸Moore v. Smaw, 17 Cal. 199, (1861).

³⁹*Mineral Resources of the United States*, p. 1004, 1883-1884.

to certain lands acquired from the Indian tribes. The general mining laws enacted by Congress are effective on the public domain in Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming, and parts of Oklahoma.⁴⁰

When the Union was formed there were extensive tracts of public lands within the states and it devolved upon the states to provide equitable laws under which citizens might acquire title to these lands. The mineral deposits commanded special legislation in only a few states, it being held generally that complete title to the minerals should pass from the state to the individual when the title to the surface passed. In 1843 an act of the Pennsylvania legislature established the principle that the entire estate of the Commonwealth passed with the patent granted by the State. The Georgia courts held in 1844 that, unless specific reservation is made, title to minerals passes with the land.⁴¹

The notable exception to this practice of the states has been New York. In 1786 the New York legislature directed the reservation of minerals on state lands. Gold and silver were held to belong to the sovereign, which in this instance was the state. This right of sovereignty was reasserted by the state legislature in 1828.⁴² At present the New York statutes include⁴³ the statement that all mines of gold or silver discovered anywhere in the state become the property of the state; the state also claims mines discovered on lands owned by persons not citizens of the United States; all mines discovered upon lands belonging to the state; and all mines discovered upon the lands of a citizen of the United States provided that the ore on an average shall contain less than two equal third parts in value of copper, tin, iron, and lead or any of these metals. Upon the discovery of minerals on the lands of the state, citizens of the state, after complying with certain regulations, may work the mines if they pay a royalty to the state of two percent of the market value of the product. The discoverer is exempted from paying royalty for twenty-one years and thereafter is required to pay a royalty of only one percent.

The state of Texas owned extensive tracts of land and

⁴⁰Lindley, *American Law of Mines*, I, 38.

⁴¹State of Georgia v. Canatee, 3 Kent 378.

⁴²3 Kent 378.

⁴³*New York Laws*, 1909, Vol. IV, Chap. 50.

originally (1837) reserved the minerals, but in 1866 the State provided for the sale of mineral lands without reservation.

Michigan has enacted laws regarding precious metal mines, specifying that mines containing gold and silver in any proportion are the property of the people of the State in their right of sovereignty.⁴⁴ However, provision has been made that this shall never apply to mines in lands owned by citizens of the State.

In the early days of mining in California, the State held that it possessed the regalian right to the precious metals in the public lands of the United States. The early ruling of the courts was reversed in 1861⁴⁵ and California has abandoned its claim to rights in the precious metals. California has never asserted any regalian rights in the precious metals in private lands. "Although apparently not expressly passed upon in other states, it is not probable that, if the question ever arises, any regalian right to the precious metals would be recognized in any of them."⁴⁶

Property in mines and mineral lands. Mining operations may be conducted under various types of ownership of the minerals or of rights to work them:

(1) The title to the surface and to the minerals beneath the surface and within the property lines may rest in one person.

(2) The title to the surface may carry with it the right, called the "extralateral right",⁴⁷ to follow the vein of ore on its dip outside certain property lines.

(3) The title to the minerals may be entirely separate from the surface right.⁴⁸

(4) The right to mine may be secured as a grant or lease upon the payment of a rental or of a royalty.

(5) The mining right may be simply a license or a grant for a short period of time, revocable at the pleasure of the owner of the mining right.⁴⁹

In certain states in which the title to the minerals has been acquired from the Federal Government by the location of mining claims upon the public domain and in accordance with the Acts

⁴⁴2 How. Ann. Stat., Sec. 5475, 5476.

⁴⁵17 Cal. 199.

⁴⁶Shamel, C. H., *Mining, Mineral, and Geological Law*, p. 26.

⁴⁷U. S. Revised Statutes, Sec. 2322.

⁴⁸1 Pa. 726; 84 Ala. 228; 96 Ill. 279; 137 Pac. 386.

⁴⁹Barringer and Adams, *The Law of Mines and Mining in the United States*, p. 67. See also 53 Pa. 216; 123 N. Y. 298; 32 Fed. Rep. 177.

of Congress of 1866 and of 1872, the title to the surface of such a mining claim upon a lode or vein carries with it the right to follow the vein on its dip and between vertical planes through the parallel end lines of the claim. The privilege of following the vein on its dip, called the "extralateral right", gives to the locator upon a vein the right to mine ore outside his side (property) lines but similarly it takes from him the right to any minerals within his property lines occurring in veins which do not outcrop within his own surface boundaries. In other words, the discoverer of a vein who locates and holds a lode claim upon the public domain in accordance with the federal laws and the state statutes, acquires the unlimited and the perpetual mining right upon that particular vein between vertical planes through the parallel end lines of his claim.

When such a claim is patented according to the federal laws, a deed is issued and the claim becomes taxable by the state as other real estate. Prior to patenting, the vein itself remains the property of the United States and is not subject to taxation. The possessory right (of the locator) to the claim or location can be transferred or sold, is held to be property, and is subject to taxation by the state and the local authorities.⁵⁰ In some states this possessory right is classed as personal property⁵¹ and in others, as real estate.⁵²

The title to the minerals may be entirely separate from the soil and the title to the minerals may be divided so that the right to mine coal or only one seam of coal may be in one estate, another seam of coal may belong to a second, the right to drill for oil and gas may belong to a third, and the right to all other minerals may be reserved for a fourth.⁵³ The right to oil and gas is recognized in the same way as is the right to solid minerals in place.⁵⁴ Such a separation of interests may be made by sale or by reservation, and a deed for the mining rights is executed the same as for the surface rights.

The mining right as a lease or grant for a definite period is recognized by the courts as a property right and is taxable.

⁵⁰State v. Moore, 12 Cal. 56, (1859); Hale and Norcross G. & S. M. Co. v. Storey Co., 1 Nev. 105, (1865); Forbes v. Gracey, 94 U. S. 762, (1876).

⁵¹Waller v. Hughes, 11 Pac. 122, (1886).

⁵²1 Mont. 245, (1870).

⁵³Northern Pacific v. Mjelde, 137 Pac. 386, (1913).

⁵⁴Kelly v. Oil Co., 57 Ohio St. 317, (1897).

Mining operations are frequently carried on under lease when the mineral rights are severed from the surface. Under such conditions the following interests exist within and upon the same tract of land: (a) The surface right, (b) the mineral right, (c) the leasehold.

License to mine for a short period is usually not recognized as a separate interest for purposes of taxation.

The following kinds of property owned by mining operators are recognized and distinguished by the statutes of various states: (1) Surface rights when valuable for other than mining purposes; (2) surface improvements used for other than mining purposes; (3) surface improvements used only in conducting the operations of one mine or a group of mines owned by the same interests; (4) surface improvements used in conducting a custom business, such as a smelter or mill which receives ore in addition to that produced by the mines owned by the company operating the smelter or mill; (5) unpatented mineral land; (6) undeveloped mineral lands; (7) mining rights separate from the surface; (8) non-producing mines; (9) unprofitable mines; (10) profitable mines; (11) mined mineral product; and (12) mining leases.

The nature of the earnings of mines. The value of mining property is determined either immediately or remotely by the earnings it will return upon the capital invested. Mining operations exhaust mineral deposits and the returns from the sale of the product must be sufficient to pay all operating expenses, a dividend upon the capital invested sufficient to justify the mining risk entailed, and to amortize the entire capital invested within the period of the assumed life of the mine. Previously it has been unusual for American metal mining companies to create a sinking-fund to replace the capital invested but this is now being done by some interests. They have instead paid larger dividends and have left it to the stock-holders to set aside annually in their personal accounts some suitable item for redeeming the capital invested. The American mining dividend therefore must generally be considered on an entirely different basis from the dividend upon other industrial investments because it represents both a dividend and an annuity to reimburse the stock-holder for the sum he has invested for his stock. If the mining company is actually providing a sinking-fund in anticipation of the depletion of the mineral deposit, this fact must be recognized. In other words, the management of

such a mine would be maintaining its assets (the ore reserves plus the sinking-fund) at not less than a certain amount. If no sinking-fund is thus maintained the assets of the company will be constantly decreasing with the depletion of the mineral deposit and ultimately not only the earning power of the mine will be lost but the entire value of the mine will be represented by second-hand equipment on the property which is frequently so remote from a market that it will be of no value whatever.

In appraising mines for the purpose of taxation and in estimating the returns from mines and incomes from mining investments it will be necessary to keep clearly in mind the real nature of the earnings of mines.⁵⁵

MINERAL RESOURCES OF THE UNITED STATES

Geographical distribution of the mineral deposits. Valuable mineral deposits are scattered widely throughout the United States. The statistics of the United States Geological Survey show that of all the states only Rhode Island and Delaware produced less than one million dollars worth of minerals in 1912. Of the total value of the output of the United States the New England states produced 1.4 percent; the Middle Atlantic states 30 percent; the Southern states 12.4 percent; the Central states 29.7 percent; the Mountain states 16.6 percent; and the Pacific states 6.1 percent. Twenty-eight states are important producers of coal, twenty-four produce some iron-ore, twenty have produced and eleven are now important producers of petroleum, nine produce copper, sixteen produce gold, twenty-six quarry granite, fifteen mine lead and zinc, thirty quarry limestone on a large scale, twelve mine gypsum, and thirty-one quarry sandstone.

While a number of the states have not developed important

⁵⁵Marshall says: "A royalty is not a rent, though often so called. For, except when mines, quarries, etc., are practically inexhaustible, the excess of their income over their direct outgoings has to be regarded, in part at least, as the price got by the sale of stored-up goods—stored up by nature indeed, but now treated as private property; and therefore the marginal supply price of minerals includes a royalty in addition to the marginal expenses of working the mine. The royalty itself on a ton of coal, when accurately adjusted, represents that diminution in the value of the mine, regarded as a source of wealth in the future, which is caused by taking a ton out of nature's storehouse." Marshall, A., *Principles of Economics*, 6th Ed. Book V, Chap. X, Sec. 6. See also *Ibid.* Book IV, Chap. III, Sec. 7; Taussig, F. W., *Principles of Economics*, II, 92.

metalliferous deposits or extensive and valuable deposits of mineral fuels, yet most of the states possess mineral deposits of economic importance which are contributing toward the welfare of the commonwealth and of the nation.

Importance of the mineral resources. The value of the mineral resources in various states and in the nation as a whole has undoubtedly been realized to a large degree by citizens, by officials, and by economists at home and abroad. Leroy-Beaulieu in discussing the mineral industry of the United States⁵⁶ says: "Clearly no country has been so richly dowered by nature with mineral resources of all sorts and, however high may be our estimate of the qualities of its people, it is not unfair to say that the marvelous wealth of the subsoil of the United States contributes more than aught else to its economic strength."

The rapid development of these resources is indicated by the statistics of value of mineral products as reported by the United States Geological Survey, as follows:

Year	Total
1880	\$ 364,928,298
1890	606,476,380
1900	1,107,031,392
1905	1,623,664,785
1910	1,991,216,220
1911	1,926,284,008
1912	2,244,033,833
1913	2,439,159,728
1914	2,114,946,024

It seems important then that there should be adopted a policy both for the development and the use of mineral resources upon the public domain and within lands privately owned which will result in the most beneficial use of these resources under our existing form of government.

At the present time, according to the United States Geological Survey,⁵⁷ this country is contributing a large part toward the world's annual production of minerals. "The United States mines nearly 40 percent of the world's output of coal and produced 65 percent of the petroleum in 1913. Of the more

⁵⁶Leroy-Beaulieu, P. *The United States in the Twentieth Century*, p. 223, New York, 1907.

⁵⁷Smith, G. O. *Our Mineral Reserves*. Bul. 599, U. S. Geological Survey, Washington, 1914.

essential metals, 40 percent of the world's output of iron ore is raised from American mines, and the smelters of the United States furnish the world with 55 percent of its copper and at least 30 percent of its lead and zinc."

An estimate of mineral resources can not, of course, be more than an approximation which attempts to predict what quality of mineral deposits may eventually be of economic importance. For example, the coal resources of the United States, exclusive of Alaska, have been estimated at fifteen hundred billion short tons.⁵⁸ At the present rate of production and of domestic consumption the supply would last many years; at an increasing rate of consumption, the life of the deposits would be greatly shortened. It is outside the field of this investigation to enter into a discussion of the extent and value of these resources, or to propose policies for their development and use, but it seems appropriate to direct attention to the policy and the experience of the nation and of the political units in dealing with the mineral resources.

POLICY REGARDING THE MINERAL RESOURCES

Federal policy. During the period from 1785, at which time the Continental Congress first reserved rights in minerals, to 1866, when Congress provided for the sale of the lode lands of the West, there seemed to be considerable difference of opinion as to the policy that Congress should pursue in disposing of the mineral lands of the public domain. The almost complete failure and the unpopularity of the leasing system, as tried in the Mississippi Valley and in the Lake Superior region, caused President Polk in a message to Congress, December 2, 1845, to recommend that the mineral lands be placed upon the market and sold. Directly thereafter Congress opened to sale the mineral lands of the Middle West. However, the specific reservation of minerals by the pre-emption laws and in the grants to railroads and to states continued the problem on an even greater scale, particularly after gold was discovered in California in 1848. Various schemes of government ownership and of government leases were suggested, but, with the experience with the lead leases serving to warn against the leasing system and with the miner pointing to the generous policy of the government in disposing of agricultural lands, Congress finally, in 1866,

⁵⁸*Ibid.*, p. 11.

adopted the policy of selling the mineral lands. This policy has been extended to include all types of mineral deposits.

The revenue secured from the sale of these mineral lands has been comparatively small and the federal government has derived no additional revenue from them except through internal revenue taxes, licenses, and the corporation and income taxes; but the federal policy has encouraged the rapid development of the mineral resources of the Western states.

State policy relating to mines. The policies of the various states in dealing with mineral resources have varied widely. The policy may change with the economic development of the state and one of the following plans may be adopted:

A. The state may retain the title to the minerals and may either (1) carry on mining operations as a state enterprise or (2) may permit citizens to open mines and for this privilege the state may charge a royalty or a rental.

B. The state may sell the lands or the mining rights and then (3) tax the mines or mining rights, or (4) may exempt them from taxation, or (5) may grant bounties or premiums in order to encourage and hasten the development of the mineral resources.

The granting of an exemption from taxation or of a bonus or a reward may occur during the development period of mining or during the decline of a particular mine, in the latter case in order to prolong the period of operation.

Some of the states, notably Minnesota, have retained large areas of public land containing extensive mineral deposits and have leased these to mining operators, thus securing considerable state revenue. In some states large grants of land have been set aside for the public schools and for institutions of higher learning. Upon exploration some of these tracts have been found to contain valuable mineral deposits. The policy of leasing these lands has frequently been adopted. Such state and school lands are generally exempt from taxation. The effect of this reservation of large tracts of land, exempt from taxation, within important industrial districts is to increase the burden of local taxation upon the adjacent property.

Exemptions. The states that have exempted mines from taxation have planned to assist the entire mining industry during a stated period or to assist single mines during the development period.

(1) Every mine may be exempt during the years immediately following its opening. Maine has exempted mines from

taxation for ten years from the date of opening. Improvements and lands are taxed as is other property.⁵⁹ Vermont exempts mines and quarries together with improvements and machinery for a period of five years. This period may be extended by the vote of the municipality.⁶⁰

(2) All mines may be exempt during the period between specified dates. Colorado exempted all mines, except surface improvements, for ten years after the admission of the state to the Union.⁶¹ Louisiana permitted the exemption of mining companies from local taxes from 1900 to 1910.⁶² In 1885 Michigan suspended the specific tax on mines, as it applied to gold, silver, and lead mines, for a period of five years.⁶³ The Arkansas constitution of 1874 provided that the General Assembly might by general law, exempt from taxation the capital invested in any or all mines in the state for the term of seven years following the ratification of the constitution.⁶⁴

(3) All mines may be exempt from certain taxes during any year that the output is less than a certain amount. An Oregon statute provides that, if the output of a domestic mining company does not exceed one thousand dollars in the preceding year, the company may pay ten dollars in lieu of the annual license fee.⁶⁵ This same principle applies in a number of states which classify mines as producing and non-producing. Mines having an output in any year valued at less than a specified sum are exempt during that year.

(4) All mines may be exempt from taxation until a dividend is earned. New Hampshire taxes the surface improvements but exempts the mine itself until the first dividends are declared.⁶⁶

(5) Mines may be exempted at the discretion of the state legislature. The constitution of Idaho permits the legislature from time to time to make such exemptions as shall seem necessary and just.⁶⁷

⁵⁹*Revised Statutes of Maine*, 1903, Chap. IX, Sec. 3 and 6.

⁶⁰*Vermont Public Statutes*, 1906, Sec. 499.

⁶¹*Colorado Constitution*, Art. X, Sec. 3.

⁶²*Louisiana Constitution*, Art. 230.

⁶³*Public Acts of Legislature of Michigan*, 1885, Act 131.

⁶⁴*Constitution of Arkansas*, 1874, Art. X, Sec. 3.

⁶⁵*Oregon Laws of 1913*, Chap. 73.

⁶⁶*New Hampshire Public Statutes*, 1901, Chap. 55, Sec. 4.

⁶⁷*Idaho Constitution*, Art. VII, Sec. 5.

Bounties. Industrial bounties have been granted by various states from time to time in order to encourage mining.⁶⁸ Bounties for the production of salt were granted by New York in 1822, by Michigan in 1859⁶⁹ and by Alabama in 1861. In 1827 Vermont offered a premium of five hundred dollars for the first five hundred bushels of salt manufactured in the state. Utah offered one thousand dollars in 1854 to any one who would open a good coal mine within forty miles of Salt Lake City.⁷⁰ In 1887 Nevada offered a series of rewards for the improvement of metallurgical methods in the reduction of ores containing the precious metals and in 1901 offered a reward of one thousand dollars to the first person who should produce five barrels of crude petroleum from a well within the state. Similar prizes were offered for the production of natural gas and artesian water.

REVIEW OF UNITED STATES MINING HISTORY

The development of systems of taxing mines logically followed the development of the mining industry. Prior to 1848, mining did not hold the important position as a national industry that it now holds. When the Federal Government was organized in 1780 there was but little mining within the national boundaries. Probably the most important mines were those for iron which had been opened along the Atlantic coast.⁷¹ The first seventy years of our national life were notably a period of acquisition of territory rich in minerals, and a period of exploration and of discovery. Among the noteworthy events and developments in the mining industry were the opening of the anthracite fields in Pennsylvania, the mining of bituminous coal in Pennsylvania, Maryland, and other eastern states; the use of anthracite and of bituminous coal in the blast-furnaces; the development of gold mining on a small scale in Georgia and several other southern states; the opening of copper and iron mines in Michigan; of zinc mines in New Jersey, of lead mines in Missouri, Illinois, Iowa, and Wisconsin; and the discovery of gold in California in 1848. With the great development of the precious metal deposits there came also extensive industrial development and the opening-up of deposits of the base metals

⁶⁸Powell, F. W. Industrial Bounties, *Quarterly Journal of Economics*, 1913, XXVIII, p. 191.

⁶⁹Repealed in 1869.

⁷⁰*Utah Legislative Journal*, 1860-1861, p. 73; 1862-1863, p. 65.

⁷¹Swank, J. M. *American Iron Trade in 1876*. Philadelphia, 1876.

and of fuels. Prior to 1848 little attention was paid to the taxation of mines.

The period from 1848 to 1859 was notably a placer mining period. The value of the output of gold and silver for the period is estimated at \$325,000,000. The discovery of the Comstock and other lodes in the Rocky Mountain region in 1859 opened the bonanza period of lode mining in United States mining history.

During the years from 1859 to 1898 there was substantial development and extensive scientific exploration of the mineral resources of the nation.⁷² The development was general throughout the states, but only the richest and the easily accessible deposits were opened. Taxation of mines received attention in the western states and territories, but in the Middle West and in the East relatively little attention was paid to this phase of taxation. With the increase in the population of the mining districts and with the development of extensive agricultural and industrial interests in the mining states and districts, tax payers in general have endeavored to place a relatively greater tax burden on the mines and mineral lands. This movement came largely during the period following 1890.

The discovery of iron ore on the Mesabi iron range in Minnesota in 1890 has been referred to as the last and greatest of the mineral discoveries. The period which then opened has been notable particularly on account of the large-scale development of low-grade mineral deposits, although some rich mines and districts have been opened during the period. Following the use of the steam-shovel in mining there began a search for mineral deposits, which, although of poor quality, were extensive and regular enough to warrant the construction of large plants for mining, handling, and treating the ores. The development of the Mesabi iron range, of the so-called "porphyry copper mines", and of the low-grade gold deposits of the West, has placed this type of metal mining upon a basis that suggests comparisons with manufacturing and similar enterprises. The value of the mineral output of the United States increased from \$606,476,380 in 1890 to \$2,445,805,017 in 1913.⁷³

The development of mining has played an important part in the industrial history of many of the states and of the nation

⁷²Hewitt, A. S. A century of mining and metallurgy in the United States, *Trans. American Institute Mining Engineers*, 1876, V, 164.

⁷³*Mineral Resources of the United States*, United States Geological Survey, 1913, p. xxii.

as a whole.⁷⁴ In several states considerable state revenue has been secured from the mines and a number of the activities of the states have been made possible on account of the revenue thus derived. Other states have derived comparatively little public revenue from mining in proportion to the earnings of the industry. In the succeeding chapters attention will be directed particularly to the problems of taxation in the states, federal taxation receiving attention only in Chapter II.

⁷⁴In addition to the references cited, see also the following upon the history of mining in the United States:

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CHAPTER II

FEDERAL TAXATION OF MINES

The Federal Government derived no revenue from mines and mineral lands, except from leases and from the sale of lands, until the first Federal income tax was imposed August 6, 1861.¹

Revenue has been secured at various times through internal revenue taxes upon output, mining licenses, income taxes, and the corporation excise tax.

INTERNAL REVENUE TAXES

Taxes on mineral products. The products of mines have been subjected to internal revenue taxes, notably during the Civil War. On July 17, 1862, Congress levied upon the producer "on all mineral coals, except such as are known in the trade as pea coal and dust coal, three and a half cents per ton, provided, that for all contracts of lease of coal lands made before April 1, 1862, the lessee" should pay the tax.² The laws of March 3, 1863, amended the foregoing act and provided that the tax on all coal mined and delivered at the mines on contracts made prior to July 1, 1862, should be paid by the purchasers thereof.³ The rate was raised to five cents a ton on June 30, 1864.⁴ By the Act of March 3, 1865 the rates upon pea coal were specified⁵ and a duty of one dollar a barrel was levied on crude petroleum or rock-oil.⁶ A tax of one-half of one per cent was levied upon bullion produced.

Mining license. A Federal license was required by the Act approved March 3, 1865, of all persons, firms, or companies employing others in mining, providing the receipts of the mine exceeded annually one thousand dollars. The charge for this license was ten dollars.⁷ Under the Internal Revenue Act of June 30, 1864, as amended in 1866, a mining company assaying

¹12 *Statutes at Large* 309.

²*Public Laws of United States*, 37th Cong. 2d Sess., Chap. 119, Sec. 75.

³*Ibid.*, 37th Cong. 3d Sess., Chap. 74.

⁴*Ibid.*, 38th Cong. 1st Sess., Act. 146.

⁵*Ibid.*, 38th Cong. 2d Sess., Chap. 78.

⁶*Ibid.*, 38th Cong. 2d Sess., Chap. 78.

⁷*Ibid.* Chap. 78.

its own ores was required to pay a special tax as an assayer.

Corporation excise tax. By an Act of August 5, 1909, a special excise tax was levied upon the business of corporations.⁸ All corporations, joint stock companies, and associations organized for profit and having a capital stock represented by shares were subject to this tax, which was levied "with respect to the carrying on or doing business." The rate was fixed at one percent upon the entire net income, over and above five thousand dollars, received from all sources during each year exclusive of amounts received as dividends upon stock of other corporations subject to the corporation excise tax.

In addition to the deductions for operating expenses actually paid within the year out of income, necessary charges for maintenance, losses sustained, and for depreciation might be deducted.⁹ Various changes in the interpretation of the law were made during the period it was in force.¹⁰

Several mining companies claimed that mining was not a "business" in the sense used in the excise law and an attempt was made by some of the companies to recover the taxes paid. In *Stratton's Independence v. Howbert*,¹¹ the plaintiff claimed that, "The proceeds of mining operations result from a conversion of the capital represented by real estate into capital represented by cash, and are in no true sense income." The defendant claimed, "The mineral as it lies in the ground is capital, but when it is extracted and sold, the result is a flow, and income has accrued." The court, in discussing the nature of mining said, "The peculiar character of mining property is sufficiently obvious. Prior to development it may represent to the naked eye a mere tract of land with barren surface, and of no practical value except for what may be found beneath. Then follow excavation, discovery, development, extraction of ores, resulting eventually, if the process be thorough, in the complete exhaustion of the mineral contents so far as they are worth removing. Theoretically, the entire value of the mine, as ultimately developed, existed from the beginning. Practically, however, and from a commercial standpoint, the value—that is,

⁸36 *Statutes at Large* 112. 61st Congress, Sess. 1. Chap. 6, Sec. 38.

⁹*Regulations No. 31*, United States Internal Revenue Department, Dec. 3, 1909.

¹⁰United States Treasury Department, T. D. No. 1742. See also *Engineering and Mining Journal*, 1913, XCV, 488.

¹¹231 U. S. 403, (1913).

the exchangeable or market value—depends upon different conditions. Beginning from little, when the existence, character and extent of the ore deposits were problematical, it may increase steadily or rapidly so long as discovery and development outrun depletion, and the wiping out of the value by the practical exhaustion of the mine may be deferred for a long term of years". The court held: (1) Mining corporations are not different from other corporations in the application of the law. (2) The proceeds of ore sales resulting from mining operations conducted on a corporation's own premises are income just as is the case with any other income. (3) The value of the ore before being mined can not be regarded as subject to depreciation and treated as such.¹²

The corporation excise tax was superseded by the income tax of October 3, 1913.

INCOME TAXES

Civil War income tax. On August 6, 1861, Congress enacted a law providing for a Federal income tax.¹³ This act levied a tax of three percent on all income in excess of eight hundred dollars. It was repealed and then re-enacted July 1, 1862.¹⁴ The new law imposed the same rate, three percent, upon the excess of income above six hundred dollars up to ten thousand dollars, and five percent on the excess over six hundred dollars when the income exceeded ten thousand dollars. The rates and the amount of exemptions were changed a number of times until finally by Act of July 14, 1870,¹⁵ the tax was discontinued after 1871.

Act of 1894. Again in 1894 Congress enacted a law providing that incomes should be taxed from January 1, 1895, to January 1, 1900. While this act never became effective, it is interesting to note the rules which were to control in determining

¹²In the District Court of Colorado in 1912 it had been held (207 Fed. 419) that the words "net income" as used in the Act of August 5, 1909, do not contemplate an allowance, in favor of a corporation operating a mine, for ore in place extracted from the property; the net income being the value of what is extracted after deducting the cost of extraction and treatment and the cost of administering the corporation with a reasonable reservation for contingencies.

¹³12 Stat. at Large 309.

¹⁴*Ibid*, p. 473.

¹⁵16 Stat. at Large, 257.

income from mines.¹⁶ Incomes from coal mines were to be reported and no deductions were to be made on account of the diminished value, actual or supposed, of the coal vein or bed by mining.¹⁷ The profit on the sale of mined coal was held to be the difference between the amount received and the expense of production, excluding all deductions for the personal service of the miner and family, plus the amount paid for each ton to the owner or lessor of the mine.¹⁸ Leases were held to be personal property.¹⁹ Rent from mines, or royalty, was held to be income and was to be included in the returns. A mining claim arising from the location of a mine on the public mineral lands was held to be personal property, and the difference between the actual cost and the price received from the claim was the profit.²⁰

Act of 1913. In order to insure the constitutionality of a Federal income tax, a constitutional amendment²¹ was adopted authorizing Congress to levy taxes on incomes. On October 3, 1913, Congress enacted an income-tax law,²² which superseded the special excise tax on corporations, enacted August 5, 1909. "Insofar as it relates to the tax levied against corporations, the income-tax law is not essentially different from the special excise tax law; except that it is a little broader in its scope and comprehends certain organizations which are not subject to the special excise tax."

"As applied to corporations the essential differences between the old law and the new are these:

1. The excise-tax law applied only to corporations, etc., no matter how created or organized.

2. The excise-tax law levied a tax equivalent to one percent on the entire net income over and above \$5,000; the income-tax law levies the tax of one percent upon the entire net income, without any specific exemption.

3. The excise-tax law required all income from whatever source to be returned; the income-tax law does not require

¹⁶Gould, J. M. and Tucker, G. F. *The Federal Income Tax Explained*. Boston, 1895.

¹⁷*Regulations Relative to the Income Tax*, p. 31, Washington, 1894. Bout. 274.

¹⁸7 *Int. Rev. Record* 60.

¹⁹7 *Ibid.* 59; 2 *Ibid.* 44.

²⁰4 *Ibid.* 124.

²¹Amendment XVI., February 25, 1913.

²²38 *Statutes at Large* 114.

income from obligations of the United States or of any State or Territory or political subdivision thereof to be returned for taxation.

4. The excise-tax law authorized corporations to deduct from gross income dividends received on the stock of other corporations subject to the tax, while under the income-tax law such dividends are not exempt from the tax in the hands of the corporations receiving them.

5. Under the excise-tax law the interest deduction was limited to the amount of interest actually paid within the year on an amount of indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, while under the income-tax credit may be taken for an amount of interest actually paid within the year on an amount of indebtedness not in excess of one-half of the sum of the interest-bearing indebtedness and the paid-up capital stock outstanding at the close of the year.

6. Under the excise-tax law every corporation subject to the tax was required to make its returns on the basis of the calendar year, while under the income-tax law corporations may, by properly designating for this purpose a fiscal year, make their returns on the basis of the fiscal year so established."²³

In computing net income for the purpose of the normal tax the deductions allowed are as follows: First, the necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses; second, all interest paid within the year by a taxable person on indebtedness; third, all national, state, county, school, and municipal taxes paid within the year, not including those assessed against local benefits; fourth, losses actually sustained during the year, occurring in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise; fifth, debts due to the taxpayer actually ascertained to be worthless and charged off within the year; sixth, a reasonable allowance for the exhausting wear and tear of property arising out of its use or employment, not to exceed, in the case of mines, 5 percentum of the gross value at the mine of the output for the year for which the computation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made;

Provided, That no deduction shall be allowed for any amount

²³*Annual Report, Commissioner of Internal Revenue, 1914, p. 14.*

paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate; seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income.

The normal tax is levied upon the entire net income of corporations. In the case of mining corporations "a reasonable allowance for depletion of ores and all other natural deposits not to exceed 5 percentum of the gross value at the mine of the output for the year for which the computation is made". The deductions permitted include a "reasonable allowance for depreciation by use, wear and tear of property, if any."²⁴

The term "gross value"²⁵ as used in describing a limit to the amount which may be deducted in the return of individuals and corporations as depreciation in the case of mines is held to mean "the bona fide market value of ore, coal, crude oil, and gas at the mine or well, where such value is established by actual sales at the mine or well; and in case the market value of the product of the mine or well is established at some other place than at the mine or well, or on the basis of the bullion or metallic value of the ore, then the gross value at the mine is held to be the value of the ore, coal, oil, or gas sold, or of the metal produced, less transportation, reduction, and smelting charges."

"Depreciation of coal, iron, oil, gas, and all other natural deposits must be based upon the actual cost of the properties containing such deposits. In no case shall the annual deduction on this account exceed 5 percent of the gross value at the mine (well, etc.) of the output for the year for which the computation is made."²⁶

"If the rate of 5 percent shall return to the corporation its capital investment prior to the exhaustion of the deposits, the rate on which the annual deduction for depletion is based must be lowered in accordance with the estimated number of years it will take to exhaust the estimated reserves. In case the reserves shall be in excess of the estimates no further deduction on account of depletion shall be made where the capital investment has been returned to the corporation."²⁷

²⁴*Regulations 33, U. S. Internal Revenue, January 5, 1914.*

²⁵*Ibid.*, Art. 6.

²⁶*Ibid.*, Art. 141.

²⁷*Ibid.*, Art. 142.

Corporations leasing oil and gas lands are required to estimate depreciation upon the cost of the lease and not upon the estimated value or production of the wells.²⁸

“Corporations operating mines (including oil or gas wells) upon a royalty basis only can not claim depreciation because of the exhaustion of the deposits.”²⁹ “Unearned increment will not be considered in fixing the value on which depreciation shall be based.”³⁰

The United States Supreme Court held that a tax levied on a mining corporation under the income-tax law of 1913 is not a direct tax on property but is a true excise levied on the business of carrying on mining operations. It was claimed that when adequate allowance is not made for the exhaustion of the ore body, the tax really falls upon the property.³¹

In interpreting the Federal corporation tax, the Court of Appeals held that when royalty is paid annually in “fixed amounts per ton of all ore taken” or as a stipulated minimum amount whether the ore was taken or not, the transaction is in effect the sale of the ore and the royalties are in fact the purchase price of the ore. The amounts paid under the name of royalties for the ore taken cannot be called or classed as income, but must be regarded as parts of the capital of the corporation, as the lessor from the ores to the royalties and claims to the purchase price of such ore, which the lessee covenanted to and did pay under the name of royalties, and such sums are not subject to the United States corporation tax act.³²

Act of 1916. The law of 1913 was amended in 1916 and among the changes made were several that have an important effect upon the mining industry. The rate is continued at two percent of the net income of corporations, joint stock companies, and associations. The deductions permitted include “a reasonable allowance for the exhaustion, wear and tear of property arising out of its use of employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion

²⁸*Ibid.*, Art. 144.

²⁹*Ibid.*, Art. 145.

³⁰*Ibid.*, Art. 146.

³¹*Stanton v. Baltic Mining Co.*, 240 U. S. 103, (1916).

³²*von Baumbach v. Sargent Land Co.*, 219 Fed. 31, (1914).

thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: Provided, that when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March 1, 1913, the fair market value as to that date, no further allowance shall be made.⁷³³

³³Act of 1916, sec. 12.

CHAPTER III

HISTORY OF MINE TAXATION IN THE STATES

The general property tax was firmly established in the American colonies¹ before mining was developed as an important industry. As has been noted previously, in a number of the states special concessions were granted in order to encourage the rapid development of the resources, the mines being considered essentially as contributors to industrial activity rather than as sources of public revenue.

There is practically no mention of the methods of assessing and taxing mines in the state histories of taxation for the period prior to 1840. As the mineral deposits were opened and as the earnings from mines increased the older states applied the existing tax laws to mines. In 1846, Michigan departed from the common practice of applying only the general property tax to mines by levying a specific tax as a percentage upon the gross

¹The property tax was the leading form of direct levy in all the proprietary provinces. (Osgood, *The American Colonies in the Seventeenth Century*, II, 349). Maryland levied on property first in 1654 and regularly after 1666. (*Maryland Archives Assembly 1666*, p. 235.) In South Carolina the property tax appeared first in 1682. In 1683 New York began regularly the system of a penny in the pound of the value of all property. (*Orders and Warrants*, M. S., 1674-1685, p. 108; Schwab, *History of the New York property tax, Publications of the American Economic Association*, V, 5). Ability as measured by the ownership of property came to be the basis of taxation in New England. In 1634, Massachusetts adopted the policy of levying taxes according to the estates held. (Douglas, *Financial History of Massachusetts*, p. 18). The property tax was developed later in Virginia and in a different form. (Ripley, *Financial History of Virginia, Columbia University Studies in Political Science*, 1893, IV, 18).

See also the following:

Madison, James. Territorial taxation of land. *Executive Documents*, 7th Congress, 1st Session, January 14, 1802.

Wolcott, Oliver, Sec. Systems of taxation now prevailing in the several states. *Ibid.*, 4th Cong., 2d Sess., Dec. 14, 1796.

Report reviewing methods of state taxation, American State Papers No. 7, Finance No. 1. *House Document 100, 4th Congress, 2d Session*, Dec. 14, 1796.

value of the products of the iron and copper mines. In 1853 the Michigan legislature first imposed a tonnage tax on coal, iron ore, and smelted copper or copper mineral. Pennsylvania, using the general property tax, began at an early date to recognize mineral rights, separate from the land, as a form of property subject to taxation. The courts definitely approved the practice in 1857.

Some of the mining states and territories of the West followed the experience of the Eastern states in framing their state tax laws. The general tax laws were applied to the mines in California, Washington, Oregon, North Dakota, and South Dakota. But in the other Western states attempts have been made to devise special systems of taxation for mines.

Prior to the enactment of the Federal mining laws, the miners established local mining districts with their own local laws and local government. Some public revenue was necessary. In the year 1861 the miners in a district of what is now Boulder County, Colorado, then Nebraska Territory, levied a tax at a uniform rate per mining claim. The same system was adopted by other Western mining districts. The records of the Gold Hill District in Colorado show that on October 2, 1861, a resolution was adopted in opposition to "any system of taxation of quartz or other mining claims having anything to do with the books or with the recording of claims."²

In 1862, three years after the Comstock Lode was discovered, Nevada inaugurated the system of taxing the proceeds of mines. The state retained four-tenths of the revenue derived and the remainder was distributed among the counties.³

Arizona, in 1864, gave the mining companies the option of paying a tax on general property or an annual tax on net proceeds and fifty cents per one hundred dollars valuation of real estate. However, in 1866 Arizona repealed the law of 1864 and taxed mining companies on invested capital and capital stock, but re-enacted the proceeds tax in 1871. In 1881 Arizona again returned to the general property tax for taxing mines.

Maryland attempted to collect a tonnage tax on coal in 1874, but the law was held unconstitutional as being in restraint of interstate commerce, for it required the payment of the tax by the transportation companies.⁴

²*Tenth Census*, 1880, XIV, p. 352.

³*Laws of Nevada*, 1862, p. 131.

⁴*State v. Cumberland & P. R. Co.*, 40 Maryland 22.

The Michigan tonnage tax was declared unconstitutional in 1875 as being in restraint of interstate commerce; it discriminated between ore smelted in the state and that shipped to smelters outside the state.⁵ The tonnage law entire was repealed in 1891.

Minnesota collected a tonnage tax from iron mines from 1881 to 1896, at which time the state law was declared unconstitutional.

After having exempted mines, Colorado in 1887 imposed a tax upon mines on a valuation based on the gross proceeds.

There seems to have been a tendency in the Rocky Mountain states to tax only profitable mines and to lay whatever burden was apportioned to the mining industry of a state or of a district upon the successful mines, entirely exempting the developing and the unprofitable mines. A number of the states have taxed the possessory right to unpatented claims upon Federal and state lands and have also levied a tax, under the general property tax laws, upon all improvements upon unpatented claims and unprofitable mines.

Mining corporations have usually been subject to the same fees, licenses, and corporation taxes as corporations chartered for other purposes.

In reviewing the tax history of a number of states that have used the general property tax there is little to note that has been distinctive of the experience of these states in dealing with the mining industry when compared with the taxation of other industries and the property used in these industries. In the following section, there is given a review of the experience of a number of the states that have had special problems to solve or that have employed methods other than the general property tax.

ARIZONA

Arizona contains important mineral deposits and mining is one of the leading industries of the state, the output of the mines being valued at \$67,497,838 in 1912, \$71,429,705 in 1913, and \$60,391,272 in 1914.⁶

It is reported that there was some primitive mining within the boundaries of Arizona as early as 1650, particularly in Pima County. Gold was discovered in the Santa Rita Mountains in 1769. During the period from 1855 to 1863 mining did not

⁵Jackson M. Co. v. State Auditor, 32 Michigan 488.

⁶*Mineral Resources of the United States, 1914*, p. 32*.

develop rapidly owing to trouble with the Indians and lack of transportation facilities.⁷ In 1864 mines were taxed⁸ as other property, but were permitted to pay instead of such taxes an annual tax of five percent upon the net proceeds and fifty cents per one hundred dollars of value of real estate owned. In 1866 the law of 1864 was repealed and mining companies were taxed on invested capital and capital stock. By an act of December 15, 1868, all mining companies were relieved from the payment of taxes in 1868 beyond those assessed on their real and personal estate within the territory. The law of 1871 specified mines or possessory rights as real estate.⁹

A tax on net proceeds of mines was enacted February 4, 1875.¹⁰ In determining the gross proceeds deductions for operating expenses were to be made but not to exceed 90 percent of the gross value of the ore when such gross value was between thirty and sixty dollars per ton. Not over eighty percent might be deducted from the gross value of ore worth sixty to one hundred dollars; not over sixty percent on ores of one hundred to two hundred dollars gross value; and not to exceed forty percent on ores worth more than two hundred dollars; an added deduction of twenty dollars per ton was allowed on all ores that were roasted before reduction, and all ores valued at less than thirty dollars were exempt from taxation.

By an Act of February 9, 1877, the levy was made two percent upon the net proceeds, twenty-five percent of the revenue went to the territory and the remainder to the county.¹¹

The law of 1875, taxing net proceeds, was repealed in 1881 and mining companies were taxed under the same laws that applied to other corporations.¹²

The revised statutes of 1901 specify that the term land as used in the section of the law of taxation "shall not be so construed as to include mining claims either lode or placer".¹³ During this period there was a general impression that mines were not paying their full share of taxation and in 1903 the Governor of Arizona stated that the mining industry was

⁷For the history and geology of mining districts of Arizona see U. S. Geological Survey, *Professional Papers* 12, 21, and 43.

⁸Arizona was organized as a territory Feb. 24, 1863.

⁹*Laws of Arizona*, 1871, Act of Feb. 18, sec. 5.

¹⁰*Ibid.*, 1875, Act of Feb. 4.

¹¹*Compiled Laws of Arizona*, 1877, p. 354.

¹²*Laws of Arizona*, p. 137.

¹³*Revised Statutes*, 1901, sec. 3835.

allowed to escape its proper valuation and that a just and equitable assessment and taxation of the producing mine would not work a hardship on the mines as all would then bear their share and the tax rate could be reduced.¹⁴

In 1907 the legislature again enacted a law which provided for the taxation of mines according to their production.¹⁵ Mines were divided into two classes, (1) productive and (2) unproductive. All claims that produced \$3750 or more during the year, and groups of claims belonging to the same owner that have produced \$3750 or more per claim were included in the class of productive mines. The second class included all mines and mining claims not in the first class. All mines in this class were taxed as other property. Unpatented mines or mining claims which were unproductive were exempt from taxation except the improvements, which in all cases were taxed.

Owners of productive mines of the first class were required to report under oath the tonnage and market value of the ore produced. The assessor was required to determine the gross value of the output "on the average market quotation of each such metal in New York City and 25 percent of the gross value in money" was taken as constituting the total amount from which the levy of taxes for the current year was made. No other tax was levied upon mines in this class except a property tax on machinery, equipment, and personal property. When the surface of mining claims was used for other than mining purposes, it was taxed in the same manner as other surface property similarly used.¹⁶

Governor R. E. Sloan, in an address made at the second meeting of Governors¹⁷ defended the system of assessing and taxing mines then operative in Arizona on the ground that few mines were sold and the market value of mines could not readily

¹⁴*Report of Governor, 1903, p. 13.*

¹⁵*Laws of Arizona, 1907, chap. 20, p. 23.*

¹⁶The Phoenix correspondent of the *Engineering and Mining Journal* commented upon this law as follows: "Generally, the law has been considered fair and reasonable, although, as is the case with any application of the gross output for a taxation standard, the low-grade mines pay out of proportion to the high-grade mines, considering net earnings as the actual value standard of any operation. Apparently the mine owners are not dissatisfied with the form or substance of the present law." *Engineering and Mining Journal, 1912, XCIII, 500.*

¹⁷*Proceedings of Second Meeting of Governors, Washington, 1910, p. 146.*

be determined by assessors who were without the means of determining their value by actual examination and test. He reported that in 1910 the method in use met with "general approval" although when the system was adopted in 1907 "there was much and strong opposition" to it.

On April 30, 1912, the law of 1907 was repealed and mines were then taxed as other property upon an ad valorem basis.¹⁸ In 1912 the Tax Commission increased the assessed valuation of mines from \$14,000,000 to \$32,000,000. Two members of the Tax Commission advised¹⁹ the adoption of a law providing for a classification of mines and assessment according to both the gross and the net value of the output. These two commissioners favored a valuation upon an ad valorem basis if the system of valuation upon gross and net output was not adopted. The third commissioner preferred valuation and taxation upon an ad valorem basis but for the time favored "a graduated tax on the producing mines". In 1913 the Arizona legislature enacted a law providing for the valuation of mines according to the gross and net output.²⁰ The law was in force only two years as specified in the act. This act classified mining property as (1) producing mines and mining claims and (2) non-producing mines and mining claims, which included all mining property not in class 1.

Producing mines and mining claims were defined to be those which, after deducting the expenses of operation and such other expenses as were permitted by the Act, yielded net proceeds, or a number of claims worked under one ownership, any one or all of which after deducting the expenses of operation and such other expenses as were permitted, yielded net proceeds.

The Tax Commission determined the gross product and the net proceeds. The mining companies made annually a certified statement to the Tax Commission and upon the data thus secured, the gross value of the product was determined. The prices used were based on New York quotations for the year covered by the report. The net proceeds were determined by

¹⁸Laws of Arizona, 1912, p. 124. The constitution provides that "the manner, method, and mode of assessing, equalizing, and levying taxes in the state of Arizona shall be such as may be prosecuted by law." *Constitution*, Art. IX., sec. 11.

¹⁹*Special Report of State Tax Commission of Arizona on Mining Taxation*, 1913. pp. 6, 8, and 16.

²⁰*Revised Statutes of Arizona*, 1913, sec. 4980-4994.

subtracting from the gross the following: "All moneys spent for necessary labor, machinery, and supplies needed and used in the mining operations, for betterments necessary in and about the workings of the mine, for the treatment and reduction of ores, for the repair and betterment of mills and reduction works used and operated in connection with the mine, for transporting the ore and the conversion of the products into money or its equivalent." Such expenditures were not to include "money invested as the purchase price of the mine, in real estate or the construction of new mills or reduction works, nor the salaries or any portion thereof, of any persons, agent or officers not actually and consecutively engaged in working the mine or in personally superintending the management thereof within the state of Arizona".

Mines were valued by the Commission at four times the net proceeds plus one-eighth of the gross. Upon this valuation there was levied the same rate as was applied to property in general. All mines not having net proceeds were taxed as was other real estate. Improvements of all kinds upon both producing and non-producing mines or claims were not exempted from taxation. The law specified that nothing in the act should be "taken or construed to be a tax on either the gross or net proceeds of earnings," the purpose of the act being simply to secure a basis for valuation.

In 1911 the mines paid 19.3 percent of the state taxes; in 1912, 31.7 percent; and in 1913, 37.2 percent.²²

There was introduced in the Second Legislature, 1915, a bill²³ providing for the assessment and taxation of mines upon practically the same basis as specified in the Act of 1913. However the gross, according to the bill, would have been computed upon the average New York price of metals for the preceding ten years. This bill failed to pass and, no other legislation having been enacted, mines will be taxed²⁴ as other property.²⁵

²²*Second Biennial Report, Arizona State Tax Commission, 1914, p. 12.*

²³Senate Bill 15.

²⁴See Chap. VII for the plan of appraisal employed by the Arizona Tax Commission in 1916.

²⁵Miscellaneous references on mine taxation in Arizona:

Zander, C. M. Problems and progress in Arizona. *Proc. Nat. Tax Assn.*, 1914, VIII, 122.

———Taxation of metalliferous mines. *Ibid.*, 338.

———Taxation of non-producing patented mines. *Proceedings Territorial Board of Equalization, Arizona*, August, 1911, pp. 3-6.

COLORADO²⁶

Colorado has been an important producer of minerals for many years. It is reported that gold was found on Cherry Creek near Denver in 1849, but the real mining began with the discoveries of gold in the Clear Creek District in 1858 and 1859.

The early records²⁷ of the mining districts show that before Colorado was organized as a territory, the local rules provided for minor forms of taxation such as road taxes at a flat rate per mining claim. Output taxes were not favored in the early days.²⁸ The State Constitution provided²⁹ that for a period of ten years from July 1, 1876, mines should be exempt from taxation except the net proceeds and surface improvements. The constitution specified also that the general assembly should provide general laws for assessing property and collecting taxes. As the legislature failed to enact any laws for the taxation of mines until April 4, 1887, there was no authority for collecting taxes based upon either the net proceeds and the actual value of the improvements or the mines. Attempts were made, notably in Lake County, to force the mines to pay some taxes. In *Stanley v. Little Pittsburg Mining Company*³⁰ it was held by the court that locally mines could not be taxed until the legislature had provided machinery for carrying out the permission and instructions of the constitution. In 1882 the legislature enacted a bill providing for the assessment of mines and for ascertaining the net proceeds but the act was vetoed by the Governor. On April 4, 1887, the Colorado legislature³¹ enacted

Unsigned articles and notes.

Engineering and Mining Journal, 1886, XLII, 26; 1910, XC, 449; 1912, XCIII, 500; 1913, XCV, 1069; 1913, XCVI, 346.

Mining and Scientific Press, 1912, CV, 816; 1913, CVI, 505, 804, 1003; 1916, CXIII, 141.

Mining Science, LVII, 17.

Mining and Engineering World, 1914, XL, 635.

²⁶Organized as a territory February 28, 1861, and admitted to the Union August 1, 1876.

²⁷Raymond, R. W. Historical Sketch of Mining Law. *Mineral Resources of the United States, 1883-1884*, pp. 988-1004.

²⁸The Gold Hill District, Boulder Co., went on record October 2, 1861 as opposing a tax system which required an inspection of books.

²⁹Art. X, sec. 3.

³⁰6 Colorado 416, (1882).

³¹In 1886 the Colorado Supreme court was asked by the State Legislature to render an opinion in regard to the constitutionality of certain

laws providing for the taxation of mines previously exempt under the constitution.³² By these laws³³ no mines or mining property were exempt from taxation and producing mines, having an output exceeding in value \$1000, were to be assessed at one-fifth of the gross proceeds to be determined by the assessor. Unpatented claims were taxable upon the same basis, the right of possession being recognized as the object of the assessment.

Prior to the Act of 1887, mines paid no taxes except upon surface improvements. This act continued in force until 1902 when a new law was enacted³⁴ which for the purpose of assessment and taxation classified mining property as producing and non-producing. When the gross value of the product exceeded five thousand dollars, the property was classed as producing; if less than five thousand dollars it was classed as non-producing. A certified annual statement of output and operating expenses was required from all mining companies. Net proceeds were determined by deducting from the gross the actual cost of mining, transporting, and treating the ore. The value of the mine was fixed at one-fourth of the gross unless the net exceeded this amount in which event an amount equal to the net proceeds was taken as the value of the property.

The assessor was instructed that he should not assess a non-producing mining claim at a greater sum per acre than was assessed against the lowest producing mine or mining claim situated in the same locality.³⁵ Possessory rights to mining claims were taxable. Surface improvements were valued separately and taxed at their full cash value. Mines of coal, iron, asphaltum, quarries, and lands valuable for other metals, minerals or earths were assessed and taxed as other property.

In 1913 important changes were made again.³⁶ Under the law of 1913, producing mines and mining claims were valued proposed measures providing for the assessment and taxation of mines. The several proposed measures attempted to fix by law the actual amount at which mining claims should be assessed. In the opinion of the court (9 Colo. 623) the assessing of property was delegated to certain officers and was not to be attempted by the state legislature.

³²Art. X, sec. 3.

³³*Laws of Colorado*, 1887, p. 340.

³⁴*Ibid.*, 1902, p. 79, sec. 81, par. 3883.

³⁵*Ibid.*, sec. 3891.

³⁶*Colorado Session Laws*, 1913, chap. 139 amending sec. 5619-5626 of Revised Statutes, 1908.

at a sum equal to one-half of gross proceeds plus all the net proceeds.

There was considerable dissension over the definition of gross proceeds as used in the law. On November 16, 1913, the Colorado District Court defined "gross proceeds" as "the amount of money received after deducting freight and treatment charges".³⁷

However, this definition of gross proceeds was modified by the decision on the rehearing, March 2, 1914. The court held the gross proceeds of a mine to be the sum received by its owner from the sale of his ore at the mine. When the ore is not sold at the mine this construction necessitates the deduction of all

In passing upon the constitutionality of the Colorado law³⁹ of 1913 the Supreme Court of Colorado said,⁴⁰ after reviewing the history of mine tax laws in Colorado: "The legislature did not intend that the fractions mentioned in these different statutes should arbitrarily represent the net proceeds, as in the Act transportation, reduction and treatment charges in order to arrive at the gross proceeds."³⁸

³⁷The difficulty arose on account of conditions in the Cripple Creek District. Some of the mines sold the gold ore to local ore-buyers, others shipped to mills and smelters outside the district, and others treated the ore locally in their own plants. The mine operator who sold ore received as "gross proceeds" from the ore-buyer an amount which was the "net" after the treatment, transportation, and other charges were deducted. The question then was whether "gross" should mean the actual value of the recoverable gold in the ore, or the real sale price (for the operator) of the ore. In commenting on this situation a member of the Colorado Tax Commission said: "We recommended to the legislature the bill changing the assessment to 50 percent of the gross and all of the net from the metalliferous mines. The supreme court had defined gross, and then later on changed the definition and made it mean the sum received by the owner from the sale of his ores. The result of this decision makes it necessary to deduct the transportation, reduction and treatment charges so that the consequence has been a considerable reduction in the valuation of the mining counties. This, of course, throws the burden of taxation onto other property in those counties. Somewhere between 8 and 10 millions of dollars of valuation were lost, I believe this year." J. B. Phillips in "Legislative and administrative problems in Colorado", *Proc. Nat. Tax Assn.*, 1914, VIII, 96.

³⁸*Paxson v. Cresson Consolidated G. M. Co.*, 139 Pacific 531, (1914).

³⁹*Laws of Colorado*, 1913, p. 566, sec. 2.

⁴⁰*Tallon v. Vindicator Consolidated Gold Mining Co.*, 149 Pacific 108, (1915).

of 1902 it provided that the net proceeds should be taxed only if it exceeded one-fourth the gross proceeds, and the act provides the gross proceeds shall be obtained by deducting the cost of transportation and treatment, and the net proceeds shall be ascertained not by an arbitrary fraction of the gross but by deducting from the gross the cost of reduction, and then that a fraction of the gross plus all the net obtained in this way shall be a sum equal to the value of the mine for taxation; and while the legislature could not say that one-half the gross proceeds plus all the net in fact equals the value of the mine, yet it could lawfully say that the amount so determined should represent the value of the mine for taxation, and in this way it provides a rule for arriving at the value of producing mines for taxation and is constitutional."

The Legislature of 1915 changed the law of 1913 and now all producing metal mines are valued for taxation at one-fourth of their gross production unless their net output exceeds one-fourth of the gross in which case the net is taken. If any number of contiguous claims, owned or operated as one property by the same person, persons, association or corporation, have a gross production in excess of \$5000 per annum, the property is considered as one producing mine and taxed as such under the existing law.⁴¹

The assessed valuation⁴² of the metal mining property during the years 1912, 1913, 1914, and 1915 follows:

	1912	1913	1914	1915
Assessed valuation.....	\$18,012,830	\$46,042,067	\$41,468,531	\$32,945,057
Percent of total valuation of state.....	4.27	3.52	3.17	2.64

In the fifteen principal mining counties of the state the valuations during the years 1912, 1913, 1914, and 1915 have been as follows:⁴³

	Mining property	All other property
Assessed value 1912.....	\$17,896,172	\$ 36,947,647
1913.....	43,546,803	109,446,426
1914.....	38,355,744	107,446,395
1915.....	30,479,507	104,513,582

Additional data on Colorado may be found in the references given below.⁴⁴

⁴¹*Ibid.*, 1915, chap. 138.

⁴²*4th Annual Report, Colorado Tax Commission*, 1915, p. 32.

⁴³*Ibid.*, p. 22.

⁴⁴Brownlee, A. G. System of taxing mining properties. *Mining World*, 1910, XXXIII, 609.

IDAHO⁴⁵

Although gold was discovered on the Pen d'Orielle River in 1852, extensive gold mining did not begin in Idaho until the following decade. Today, Idaho is famous particularly for lead-silver mines and mines of this character were not opened until 1873.⁴⁶

In 1866 Idaho Territory first enacted laws regulating mining locations. The Constitution of 1889 does not provide specifically for the taxation of mines, but requires that taxes shall be uniform upon the same class of subjects.⁴⁷

In 1903, the legislature enacted a law providing that mines should be taxed upon the basis of net profits, which are determined from certified statements made annually by the mining companies. The net profits⁴⁸ are determined by deducting from the amount received for the ore the actual expenditures of money and labor in extracting, transporting, reducing, and marketing the ore, and for supplies and machinery. Unpatented mining claims are not taxed.

In his message to the legislature in January, 1913, the Downie, C. J. Historical review of mine taxation in Colorado. *Mining Science*, 1905, LXXI, 23.
 Link, C. P. Discussion of Report of Committee on Taxation of Mines and Mineral Lands. *Proc. Nat. Tax Assn.*, 1913, VII, 403.
 Phillips, J. B. Legislative and administrative problems in Colorado. *Proc. Nat. Tax Assn.*, 1914, VIII, 96.
 Webb, D. L. Taxation of mining property. *Proc. Amer. Min. Cong.*, 1913, XVI, 345.
 Unsigned articles and notes.

Cripple Creek District. *Eng. and Min. Jour.*, LXXXVI, 1178, 1273; XCII., 1080. *Mining Science*, LXV., 34, 254.

General notes on Colorado. *Eng. and Min. Jour.*, XXXV., 83, 85; XC., 876, 924, 1222; XCV., 871, 1021.

Mining and Sci. Press, CVII., 824.

Mining Science, LXVI., 225.

Bulletin American Mining Congress, Nov. 1910, p. 218; Dec. 1910, p. 233; March, 1911, p. 43.

⁴⁵Organized as a territory March 3, 1863 and admitted to the Union July 3, 1890.

⁴⁶The Wood River District became an important producer of lead in 1881, and in 1884 the first discoveries were made in the Coeur d'Alene District.

⁴⁷Art. VII, sec. 5.

⁴⁸*Revised Code*, sec. 1864.

Governor suggested that the law providing for the tax upon net proceeds is probably unconstitutional.⁴⁹

LOUISIANA

The only important mineral products of Louisiana are salt, sulphur, natural gas and petroleum. The value of the output was \$15,357,841 in 1912, \$21,011,828 in 1913, and \$21,890,025 in 1914.⁵⁰

Louisiana has taxed mines under the general property tax⁵¹ and has also imposed license taxes on the business of mining. An act of 1910 created a conservation fund by levying and enforcing the payment of an annual license tax upon all persons, associations of persons, business firms and corporations for pursuing the business of severing timber and minerals from the soil.^{51a} This law was held to be unconstitutional as it was enacted by the General Assembly before an amendment authorizing such legislation had been voted upon by the people of the State.^{51b} In November 1910 the voters of Louisiana adopted an amendment to the Constitution (Article 229) providing that "those engaged in the business of severing natural resources, as timber and minerals, from the soil or water, whether they hereafter convert them by manufacture or not, may be rendered liable to a license tax; the amount to be collected may either be graduated or fixed." In 1912 an amendment to the Constitution was proposed, including a provision as follows: "Unless otherwise provided by the General Assembly by a vote of two-thirds of the members elected to each house, all operating mines of sulphur, salt or other minerals, all oil or gas wells, all stone quarries, sand, gravel and shell pits shall be taxed upon a percentage of the gross value of the product at the mouth of the mine, well, quarry, or pit. This percentage shall not exceed five percent for sulphur; three percent for salt; two and one-half percent for oil and gas, and two percent for rock and other minerals, inclusive of gravel, sand and shells. All real and personal property of the owners of such mines, wells, quarries and pits except machinery, tools and implements absolutely essential to the operation of any mine, oil, or gas well, stone quarry, sand, gravel or shell pit, and except the products them-

⁴⁹*Message of Governor*, January 1913, p. 32.

⁵⁰*Mineral Resources of the United States*, 1914, p. 32. *

⁵¹*Laws of Louisiana*, 1898, Act 170.

^{51a}*Acts of General Assembly*, 1910, Act 196.

^{51b}*Etchison Drilling Co. v. Flournoy*, 59 Southern 867, (1910).

selves within the hands of the producer, shall be locally assessed and taxed." This proposed amendment was not adopted.^{51c}

The Legislature of 1912 enacted a law providing for an annual license tax upon each person, or association of persons, firms, or corporations pursuing the business of severing natural products, including all forms of timber, turpentine, and minerals, including oil, gas, sulphur and salt from the soil. The license tax imposed was one-half of one percent of the gross value of the total production, less the royalty interest accruing to the owner, the license on which was to be paid by the land or royalty owner. The value of all products was computed at the place where they were taken from the soil.⁵²

The Supreme Court of Louisiana in interpreting the law of 1912 which imposed a license tax on the business of severing minerals from the soil and which directed that, in computing the gross value of the product, the royalty should be deducted and that the license tax on the royalty interest should be paid by the owner of the land or royalty interest, held that the constitution authorized a license tax on those engaged in the mining business. "If the Legislature had undertaken to impose this license tax upon the land or royalty owner, not engaged in the business of severing natural products from the soil, it would have been without constitutional authority." The land owner or owner of the royalty interest was therefore released from paying a license tax when not actually engaged in the mining business.⁵³

In the Constitution of 1913 there is a provision for a license tax upon the business of mining, the amount collected being either graduated or fixed according to the quantity or value of the product at the place where it is severed.⁵⁴

In 1914 a law was enacted authorizing the Police Juries of the several parishes of the State of Louisiana to levy an annual license tax upon each person, or association of persons, firms or corporations, pursuing the business of severing natural products, viz., minerals, including oil, gas, sulphur and salt from the soil; provided the amount of the license tax shall not exceed the amount which is, or may be, similarly levied by the State of Louisiana.^{54a}

By an amendment adopted November, 1902, the capital,

^{51c}Hart, W. O. in *Proceedings of National Tax Association*, 1912, VI, 77.

⁵²*Acts of Louisiana*, 1912, Act 209, sec. 1 and 2.

machinery, and other property employed in mining operation was exempted from parochial and municipal taxation for ten years from January 1, 1900.⁵⁵

MICHIGAN

The state of Michigan has important mineral resources, notably iron, copper, coal, gypsum, salt, and building-stone. The value of the output in 1912 was \$80,062,486.⁵⁶ Michigan was admitted to the Union January 26, 1837, before the mineral resources were developed to an important degree and in fact before many of the most valuable deposits were known to exist. The presence of copper in the Upper Peninsula had been noted by explorers but the real discoveries began with the work of the Michigan Geological Survey which was created by an act of the legislature approved February 23, 1837.

Coal mining did not begin until 1835. Copper mining was begun on Keewenaw Point in 1842. A party of United States surveyors discovered iron ore near Teal Lake in 1844. Thus it was that shortly after Michigan became a state the problem of the taxation of the new mines and mineral resources required attention.

The first legislation providing for the taxation of mines was the Act of April 25, 1846. This prescribed a specific tax of four percent in lieu of all other state taxes to be levied upon all ores and the product of all mines, which tax was to be assessed

⁵³State v. Stiles, 68 Southern 947, (1915).

⁵⁴Constitution of 1913, Art. 229.

^{54a}Acts of Louisiana, 1914, Act 296, sec. 1.

⁵⁵The Louisiana Supreme Court in the case of J. M. Guffey & Co., of Pittsburg, v. J. L. Murrell, tax collector, of Crowley, La., decided that oil companies are not exempt from taxation under the act exempting capital, machinery and other property employed in mining operations for a period of ten years. The court declared: "Mining operations have to do with workings of a mine and neither in the ordinary nor in the scientific acceptance of the term 'mine' is the term 'oil well' included. Laws granting exemption from taxation must be strictly construed and so the operation of an oil well can not be held to be within the exemption granted to those engaged in mining operations." The decision was a heavy blow to oil interests in Louisiana as they had hoped to get exemption from taxation. *Engineering and Mining Journal*, 1910, XC, 1091.

⁵⁶*Mineral Resources of the United States*, 1912, p. 57. The value of the output was less in 1913 owing to the strike and also in 1914 due to the European war.

upon the average yield of the ores after being smelted, if smelted in the state; but if the ores were to be shipped out of the state before being smelted, the taxes were to be paid before the ores were removed from the premises where they were mined. This act also provided further that the tax on the product of the iron mines should not exceed two percent.⁵⁷

By an act approved April 8, 1851, an annual tax of one percent was levied on the whole amount of paid-in capital. Companies paying this tax were relieved of all state taxes on real and personal property.⁵⁸

The first tonnage tax law was enacted February 5, 1853. It provided that the following taxes be collected: one dollar for each ton of copper or mineral obtained, ten cents for each ton of iron ore, one-half cent for each ton of coal. These taxes were to be the only state taxes on these objects.⁵⁹

In 1855, the legislature definitely relieved domestic mining companies of the payment of taxes on capital stock provided they paid the tonnage taxes as prescribed by the law of 1853.⁶⁰ Township supervisors were instructed by an act in 1861 to assess the real and personal property of all mining companies not actually operating. This act provided also that all mining companies should be taxed on all land owned in excess of six hundred forty acres.⁶¹

The rates of the tonnage tax were changed by the legislature in 1865,⁶² in 1867, in 1871, and in 1872. By this last revision the rates became seventy-five cents a ton on copper smelted in the state and one dollar if smelted outside, one cent on iron ore, and one-half cent a ton on coal.⁶³

In 1873 the mining companies were required to furnish the assessor with a statement of the weight of copper produced and all copper was assessed at its cash value, as other personal property, for county and township purposes.⁶⁴

In 1875 the Michigan Supreme Court declared unconstitutional the law imposing a specific tax discriminating between

⁵⁷*Laws of Michigan*, 1846, Art. 148, sec. 14.

⁵⁸*Ibid.*, 1851, Act 144.

⁵⁹*Ibid.*, 1853, Act 41, sec. 20.

⁶⁰*Ibid.*, 1855, Act. 159.

⁶¹*Ibid.*, 1861, Act 200.

⁶²*Ibid.*, 1865, Act 136.

⁶³*Ibid.*, 1872, Act of March 29.

⁶⁴*Ibid.*, 1873, Act approved April 10.

ore smelted in the state and that shipped outside to be smelted, as being in restraint of interstate commerce.⁶⁵

The State Legislature in 1885 suspended for five years the specific tax so far as the same applied to "gold, silver, and lead and the ores of said minerals."⁶⁶ The tonnage tax was repealed in 1891 and thereafter all the property used in the business of mining, smelting, or refining was taxed for state and other purposes under the general provisions of the law relating to the assessment and taxation of property.⁶⁷

The legislature of 1911 provided specifically for the assessing and taxing of mineral rights severed from the ownership of the surface. Such mineral rights under this law were taxable as an interest in real property at the same rate and subject to all provisions of the law relating to the assessment and taxation of real property.⁶⁸ This law was repealed in 1915 and taxes under the law were discharged.⁶⁹

The legislature on April 25, 1911, directed the Board of State Tax Commissioners "to investigate, examine into, inventory and appraise all mining property in the State of Michigan and all mineral rights" and to report the result of the appraisal to the State Board of Equalization on or before the third Monday of August, 1911. An appropriation of thirty thousand dollars was made to cover the expense of this appraisal.⁷⁰

J. R. Finlay, an eminent mining engineer, was selected May 24, 1911, to appraise the mines of the state and on August 18 he filed his report. This was the first attempted appraisal for taxation of all the mines of a state by a staff of engineers not identified with an institution of the state. The appraisers could not undertake a detailed examination of all the mines, but the work done was remarkable in its extent considering the length of time allotted to the appraisal. The report filed covers the copper, iron, and coal mines but the appraisers decided that the Michigan salt, gypsum, cement, brick-clay, marl, and limestone operations should not be classed as mines. They also did not attempt to place a value upon undeveloped mineral lands.

The Board of Tax Commissioners in its report of December 14, 1912, suggested to the Governor that the State Geological

⁶⁵32 Michigan 488.

⁶⁶*Public Acts*, 1885, Act. 131.

⁶⁷Act of June 16, 1891.

⁶⁸*Michigan Public Acts*, 1911, No. 51.

⁶⁹*Ibid.*, 1915, No. 119.

⁷⁰*Ibid.*, 1911, No. 114.

Survey cooperate and furnish data on the value of the mineral lands of the state. There is now cooperation between the Geological Survey and the Tax Commission, the State Geologist acting in the capacity of appraiser of mines.⁷¹ Trained assistants have been employed for this work, the necessary funds to carry on the work having been provided by an act of the legislature. The copper mines however have not been appraised by the State Geologist.

MINNESOTA

Shortly after Minnesota was organized as a territory in 1849, iron ore was reported near Gunflint Lake.⁷² When the state was admitted to the Union in 1858 none of the important ranges had been discovered. Iron ore was discovered on the Vermilion Range in 1865,⁷³ but the first shipments were not made until 1884. Mesabi Range shipments were made in 1892, two years after the boom on that range began.

In 1881 the legislature enacted a law⁷⁴ providing that mining companies might pay annually in lieu of all other taxes, "on each ton of copper fifty cents, on each ton of iron ore mined and shipped or disposed of one cent for each ton, one-half of such payments to be credited to the General Fund of the state and the other half credited to the county or counties in which such mines" were located. This law was in effect until March 9, 1897, when it was repealed by the legislature. On May 19, 1896, the tonnage law was declared unconstitutional. A constitutional amendment was adopted permitting the taxation of mines on quantity of production or in such other manner as the legislature might determine. During the year following the repeal of the tonnage tax, mines were taxed as other property.

In 1902, the Minnesota Tax Commission advised⁷⁵ that the unanimous opinion of the Commission was that a "tonnage tax is the only appropriate means for the taxation of the output of mines." The tonnage tax recommended by this commission was to be graduated with regard to the value and the grade of ores.

The assessors working under the general property tax were unable to value the mines and secure justice among the various

⁷¹Allen, R. C. Methods of appraisal for taxation. *Mining and Engineering World*, 1914, XLVI, 463.

⁷²van Barneveld, C. E. *Iron Mining in Minnesota*, p. 9.

⁷³*Ibid.*, p. 9.

⁷⁴*General Laws, Extra Session, 1881*, chap. 54, sec. 1.

⁷⁵*Report of Minnesota Tax Commission, 1902*, p. 43.

mines, and between mines and other property. Great dissatisfaction resulted until 1907, when the Tax Commission was created and the problem of valuing the iron-mines was referred to the commission. The commission made as careful a study as was possible in the time available and adopted a basis for valuation which has been used in later appraisals.⁷⁶

No important changes in the law have been made as it affects mines since the Tax Commission was created by the law of 1913, which specifies that mines shall be assessed at fifty cents on the dollar.⁷⁷

In 1906 the state received in taxes from the iron mines \$179,272; in 1914, the state taxes paid by the iron mines amounted to \$1,314,538. At a 4-mill state tax rate and on a conservative ore exhaustion period there would be approximately a total of future tax revenue of \$28,000,000. It is evident that the Tax Commission has been instrumental in discovering a source of state revenues and in levying increased taxes upon the iron mines.

MONTANA

The mineral resources of Montana are of great importance and the revenue which the state derives from the mines in the form of taxes has proven of great assistance in conducting the affairs of the state.

As early as 1804, the Lewis and Clarke expedition noted coal along the Missouri River, but the first mining was for gold at Bannack in 1862. Placer gold mining was at its height in 1867, three years after the territory was organized. Silver mining followed the discovery of lodes in 1864, was at its height in 1887, and continued until 1892. Copper mining became of importance after the discovery of copper ore in the Anaconda shaft in 1882.

Taxation of mines received attention at an early date. By the law of 1872 both the proceeds and the capital stock of companies were subject to taxation.⁷⁸

The present practice of taxing the net proceeds of mines was practically started in 1879.⁷⁹ Deductions from the gross

⁷⁶Hurd, R. *Iron Ore Manual*, p. 20. McVey, F. L. Taxation of mineral properties, *Proc. Nat. Tax Assn.*, 1908, II, 411. *Minnesota Tax Commission Reports*. *Infra* chap. VII, p.

⁷⁷*Laws of Minnesota*, 1913, chap. 483.

⁷⁸*Statutes of Montana*, 1872. Hope Mining Co. v. Kennon, 3 Mont. 35, (1877).

⁷⁹*Revised Statutes*, 1879, chap. LIII, Art. II, sec. 1047-1051.

receipts may be made for the cost of extracting the ore from the mine, reducing it, and converting it into bullion. The Constitution provides that all mining claims assessed⁸⁰ at the price paid the United States for the land, all machinery and improvements having a value separate from the mines or mining claim, and the net proceeds of all mines and mining claims shall be taxed as provided by law. The statutes provide that mines shall pay a tax on net proceeds and on improvements.⁸¹ This law has been interpreted by the courts as applicable to coal mines.⁸²

The right to minerals has been held⁸³ to be taxable both when the claims are not patented and when the right to the minerals is severed from the surface and reserved upon the sale of the surface.⁸⁴

NEVADA

In 1849 gold was discovered in Gold Canon and in 1859 the Comstock lode was opened. On March 2, 1861, the territory of Nevada was organized. The taxation of mines at once received attention and in 1861 a law was enacted⁸⁵ which exempted mining claims, except machinery and improvements. In 1862 the proceeds of mines were taxed.⁸⁶ At the first constitutional convention, held in 1863, it was proposed that all property, including mines and mining claims, should be taxed uniformly but the constitution framed by the convention was not adopted by the voters of the state. The second constitutional convention met in 1864 and proposed a constitution containing an article which provided that the legislature should enact laws for the taxation of mines upon net proceeds alone. This constitution was accepted by the voters.^{86a} At the first⁸⁷ session of the legislature a tax of 100 cents on the \$100 valuation was levied upon the net proceeds of mines.⁸⁸ All of the ores were assessed as follows: From the gross return per ton of ore was deducted twenty dollars per

⁸⁰*Constitution*, Art. XII, sec. 3.

⁸¹*Revised Statutes*, sec. 2563-2571.

⁸²*Montana Coal and Coke Co. v. Livingston*, 52 Mont. 780, (1898).

⁸³*Northern Pacific v. Mjelde*, 137 Pac. 386, (1913).

⁸⁴Miscellaneous notes on Montana taxation: *Min. and Eng. World*, XXXVIII, 72; XXXIX, 583. *Eng. and Min. Jour.*, XCVI, 607, 663.

⁸⁵Act of Nov. 29, 1861.

⁸⁶*Laws of Nevada*, 1862, p. 131.

^{86a}Boyle, E. D. Mine taxation. *Proceedings of National Tax Association*, 1915, IX, 80.

⁸⁷Nevada was admitted to the Union Oct. 31, 1864.

⁸⁸*Laws of Nevada*, 1864-65, chap. LXXXV, sec. 99.

ton and seventy-five percent of the remainder was taxed.⁸⁹ If the value of the ores was not established, they were to be assessed at five hundred dollars per ton. Ores valued at less than twenty dollars were not assessed. In 1867 the law was amended⁹⁰ in order to make allowance for the refractoriness of ores. A deduction of eighteen dollars per ton was to be allowed for the treatment of ordinary ores but when the ore was worked by the Freiberg or roasting process or by any smelting process a deduction of forty dollars per ton was permitted. The tax rate was \$1.25 per \$100 valuation.

Additional changes were made by the legislature in 1871.⁹¹ The net proceeds were determined by deducting from the gross the actual cost of mining, melting, transporting, and smelting. When the value of the ore was less than \$12, the deduction was not to exceed 90 percent of the gross value of the ore; not over 80 percent deduction was permitted on ore valued at \$12 to \$30; not over 60 percent on ore valued at \$30 to \$100; not over 50 percent on ore valued at more than \$100. An additional deduction of \$15 was permitted for ores treated by the Freiberg process.

By the law of 1891⁹² the net proceeds were assessed and taxed at the same rate ad valorem as other property is taxed. The county assessors were authorized by the legislature of 1901,⁹³ to meet annually in order to value uniformly the property of the state. The assessors thus practically formed a state board of appraisers.

The office of State License and Bullion Tax Agent was created in 1905, and the duty of enforcing the law providing for the taxation of the net proceeds of mines was placed upon him.⁹⁴ The Constitution as amended in 1906 provides that patented claims shall be assessed at not less than five hundred dollars, except when one hundred dollars in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds.⁹⁵

⁸⁹In *State v. Estabrook* (3 Nevada 173) it was held that the part of the law which directed that the tax be levied on three-fourths of the value instead of the full value was unconstitutional.

⁹⁰*Statutes of Nevada*, 1867, Special Session, chap. III, sec. 3.

⁹¹*Ibid.*, 1871, chap. XXXV.

⁹²*Ibid.*, 1891, p. 162.

⁹³*Ibid.*, 1901, p. 61.

⁹⁴*Ibid.*, 1905, p. 226.

⁹⁵Constitution, Art. X, sec. 1.

It was the general opinion that the mining companies were evading the law. The Bullion Tax Agent pointed out⁹⁶ various defects in the law, notably the irregularities which resulted from permitting the mining companies to make deductions for the cost of milling. Separate milling companies had been organized and the profit was made through the milling company which was taxed upon plant and not upon proceeds. Recommendation was made by the Bullion Tax Agent that the administration of the tax upon net proceeds be placed under a state tax commission. In 1912, a committee of citizens was appointed to investigate taxation in Nevada and to make recommendations. The report of this committee included several recommendations,⁹⁷ notably, that a permanent tax commission be created and that the constitution be amended to permit a graduated tax upon the gross output of mines instead of the tax on the net proceeds now in force.

As a result of the work of this committee the Nevada Tax Commission was created⁹⁸ and the office of Bullion Tax Agent abolished. This Commission is charged with the duty of determining the net proceeds of mines and is given the power to decide what charges are "just, proper and reasonable, and not introduced to deprive or defraud the State."⁹⁹ The Commission found that most of the mining companies were maintaining secondary milling and transportation companies which were defeating the bullion tax. The Nevada Mine Operators' Association suggested a conference between its executive committee and the Tax Commission¹⁰⁰ and at this conference an effort was made to suggest means of correcting abuses and of providing for the equalization of the tax burden. "It was proposed by the mine operators that for 1913 the mines would abolish their milling and transportation subdivisions, and report the actual 'net proceeds' from all their operations, but that a flat charge of \$3 per ton should be allowed in addition to the legal deduction from the value of the gross yields in figuring the net, this flat charge to reduce to \$2 in 1914, and to \$1 in 1915 and thereafter."

This proposal was rejected by the Tax Commission for the reason that many mining companies in Nevada were not making

⁹⁶*Annual Report of State Bullion Tax Agent*, 1912, p. 8.

⁹⁷*Report of the Nevada Citizens Economy and Taxation Committee*, 1913, p. 99.

⁹⁸*Laws of Nevada*, 1913, chap. 134; *Ibid.*, 1915, chap. 153.

⁹⁹*Ibid.*, 1913, chap. 134, sec. 9; *Ibid.*, 1915, chap. 153, sec. 13.

¹⁰⁰*Report of Nevada Tax Commission*, 1913-1914, p. 18.

\$3, \$2, or even \$1 per ton and would by the operation of any flat-rate exemption be relieved from the payment of any taxes at all. The operators also requested permission to make a charge for depreciation of their plants. The Tax Commission carefully considered the entire matter and made a definite proposal to the operators at a conference on September 9, 1913, which proposal was formally accepted by the operators.

The proposed rule¹⁰¹ for the assessment of mines in 1913 follows:

AGREEMENT

The Nevada Tax Commission proposes the following procedure for general adoption throughout the State, in assessing the mining industry for taxation during and covering the entire year 1913:

IMPROVEMENTS

To be assessed as other property is assessed in the county in which it is situated.

ASSESSMENT OF THE NET PROCEEDS OF MINES

The net proceeds of any mine shall be determined as follows:

From the actual value of the gross yield (in any quarter) shall be deducted the sum of the following items of expense:

(1) *Management*

All necessary current administrative expenses, excepting:

- (a) Federal, state, or county taxes.
- (b) Payments of interest on bonds or other indebtedness.
- (c) Expenses of maintaining offices other than the mine office.

(2) *Cost of Extracting*

- (a) All necessary current mining expense (not including apportionment of general administrative expense) including expense of contemporaneous development and exploration of the mine itself.
- (b) A depreciation charge which shall be equivalent to, quarter-annual installment of the amount calculated to be written off annually to redeem 80 percent of the original and all subsequent investments in mine plant or improvements (not including repair and maintenance charges against operation account), within the entire estimated life of the plant, including the time during which it has been used plus its estimated residual life which may equal but not exceed the estimated life of the mine. Such depreciation or redemption charges shall cease when 80 percent of any investment in improvements shall have been charged off in the manner provided in the foregoing.

¹⁰¹*Report of Nevada Tax Commission, 1913-1914, p. 18.*

(3) *Cost of Transportation*

Where the transportation facilities used in conveying the mine products from the mine to the place of reduction or sale are owned directly or indirectly by the company:

- (a) The actual expense of operating such plant facilities, exclusive of general or administrative expense.
- (b) A depreciation charge calculated in each case to redeem 80 percent of the original investment in transportation facilities, in the same manner as mine-plant depreciation is figured.

Where the said mine products are transported by common carrier or by facilities not owned by the company and from which it derives no revenue:

- (a) The actual amount paid for the carriage of the said mine products with no allowance for depreciation.

(4) *Cost of Reduction or Sale*

Where the reduction works in which the mine products are treated are owned directly or indirectly by the company:

- (a) The actual expense of reduction or treatment or sale of product, exclusive of general or administrative expense.
- (b) A depreciation charge calculated in each case to redeem 80 percent of the investment in reduction works in the same manner as mine-plant depreciation is figured.

Where the mine products are treated in plants not owned by the company and from the operation of which it derives no revenue:

- (a) The actual amount paid for the treatment or reduction of the ores, and marketing of the product, with no allowance for depreciation.

The sums of items (1), (2), and (4) shall constitute the offset deduction from the gross yield for the determination of the actual net yield, and the remainder shall be the actual net yield for the purpose of taxation. To assess the mining industry on the same percentage of actual value as that at which other property is assessed, which is determined for 1913 as 60 percent of the actual cash value as an average for the State, a further deduction from the value of the gross yield equivalent to 40 percent of the actual net yield, as hereinbefore defined, shall be allowed and this shall be charged to management, extraction, transportation, reduction and sale, in equal proportion to each of the four said items.

The acceptance of this proposal by the Nevada Tax Commission as its rule of action, in fixing the assessment of the net yield of all mines of the State, shall be absolutely contingent on the entire abolition of the so-called secondary milling and transportation companies, as far as the statements and accounts rendered the said Commission are concerned.

The actual earnings of Nevada gold and silver mines in 1913 were much less than in 1912, but the taxes levied upon the net

proceeds of mines amounted to \$56,574.94 in 1912, and to \$182,076.37 in 1913. This increase was due primarily to the elimination of the subsidiary milling and transportation companies.

In determining the valuation of the net proceeds for 1914, the Tax Commission made a proposal to the mine operators that they should take their choice of two alternative propositions: (1) the assessment of 80 percent of the net proceeds determined as in 1913, or (2) the assessment of 60 percent of the net without depreciation. As the Attorney-General decided that depreciation was not authorized by the statute, the mine operators accepted the appraisal at 60 percent without depreciation.

The Tax Commission adopted the following rule¹⁰² for the assessment of mines in 1914:

The net proceeds of any mine shall be determined as follows:

From the actual value of the gross yield in any quarter-year shall be deducted the following items of expense incurred in the same quarter:

(1) *Management*

All ordinary and necessary administrative expense, excepting:

- (a) Payments on principal or interest on bonds or other indebtedness.
- (b) The expense of maintaining offices outside of the State of Nevada.

(2) *Mining*

All ordinary and necessary expenditures actually made for mining (exclusive of general or administrative expenses) including the cost of contemporaneous development and exploration of the mine itself.

(3) *Transportation*

- (a) Where the transportation facilities used in conveying the mine products from the mine to the place of reduction or sale are owned or controlled directly or indirectly by the mining company: The actual expense of reduction or treatment or sale of the said products.

The actual necessary expenditures for the maintenance and repair of mine, transportation and milling or reduction plants may be included in the foregoing deductions, but no charge whatever for depreciation or the redemption of any investment in mine ground, development done prior to the quarter for which the report is made, or plant construction shall be allowed.

The sums of items (1), (2), (3), and (4) shall constitute the offset deductions against the value of the gross yield, and the

¹⁰²*Ibid.*, p. 21.

difference in each case between the said gross yield and the said sum shall be deemed the net proceeds for the purpose of taxation.

To equalize the mine assessment with that of other property, 60 percent of the net proceeds determined as provided in the foregoing shall be assessed—this rule applying to all mines from which the ore is extracted directly by the owners. In the case of producing “leases” the lessee shall be entitled to deduct, in addition to the items enumerated, the royalties actually paid to the lessor, but royalties received by any lessor shall be reported separate from other receipts and 60 percent thereof shall be assessed with no deduction whatever.

NEW MEXICO

While New Mexico has never ranked as one of the leading mining states, the mineral wealth of the state is relatively of great importance when compared with the other resources. As early as 1770 Santa Rita was a flourishing gold district.¹⁰³

The Territory of New Mexico was organized December 13, 1850, and on January 18, 1865, the Territory enacted laws regulating the location of mining claims. During the succeeding years mining continued to attract attention although few important mines or districts were developed. In later years the coal and low-grade copper deposits have received much attention. The value of the mineral output was \$14,391,355 in 1912, \$17,862,369 in 1913, and \$18,072,919 in 1914.¹⁰⁴

Under the Territorial Government all property was taxed upon an ad valorem basis until 1891 when a law was enacted authorizing a tax upon the net product of mines. The Constitution, adopted and ratified January 21, 1911, specifies¹⁰⁵ that the legislature shall have power to provide for the levy of specific taxes, including “taxes upon the production and output of mines, oil lands and forests; but no double taxation shall be permitted.”

In 1891 the legislature had provided for the taxation of mines and mining claims upon “the net product and upon surface improvements only.”¹⁰⁶ The same legislature provided for the exemption of mining claims, but not the net product and surface improvements thereof, for a period of ten years after location.¹⁰⁷

¹⁰³*Bulletin 285, United States Geological Survey.*

¹⁰⁴*Mineral Resources of the United States, United States Geological Survey, 1914, p. 32.**

¹⁰⁵Art. VIII, sec. 2.

¹⁰⁶*Laws of New Mexico, 1891, chap. 77.*

¹⁰⁷*Ibid.*, 1913, chap. 84, sec. 2.

In 1913 the legislature specified that property should be listed for taxation at one-third of its cost value. The second state legislature enacted a law providing that mines, mining claims, or mineral lands be divided into two classes, (1) productive and (2) non-productive. Productive mines and mineral lands are those mined in good faith for the mineral values with a fair degree of continuity throughout the year. Productive mines are taxed upon the net value of the mineral extracted at the same rate as other properties are taxed in the county or other subdivision in which such mine is situated. All non-productive patented mining claims and other non-productive mineral lands are assessed and taxed upon a reasonable valuation for the minerals in addition to the surface value for other than mining purposes.¹⁰⁸

OHIO

The value of the mineral output of Ohio increased from \$111,229,656 in 1912 to \$121,690,661 in 1913, but decreased to \$101,661,384 in 1914.¹⁰⁹ The most important minerals produced are coal, natural gas, and petroleum.

The property tax has been used in Ohio since 1825¹¹⁰ and the tax law essentially in its present form was enacted in 1846. Property is assessed locally and taxed for state and local purposes. In assessing property its value for mining purposes is considered. As minerals are mined proper deductions from the assessed value are made. Mineral rights are assessed separately when they are owned separately.¹¹¹

The assessment of real property is made quadrennially¹¹² and of personal property annually. The assessor when appraising personal property makes a list of all new mines, wells, etc.,

¹⁰⁸*Ibid.*, 1915, chap. 55.

¹⁰⁹*Mineral Resources of the United States*, 1914, p. 32.*

¹¹⁰Bogart, E. L. Financial history of Ohio. *University of Illinois Studies in Social Sciences*, 1912, I, 181.

¹¹¹Apparently this section of the law was ignored by the assessors in 1901 as the assessed value of coal and oil lands in three counties totalled \$298,794. The value of the separately owned mineral rights as determined by the Commission in 1911 was \$17,925,993. (*Second Annual Report, Ohio Tax Commission*, 1911).

¹¹²Prior to 1911 the assessing was done by local officers elected decennially. Real estate was valued in 1826, 1835, 1841, 1847, 1854, 1861, 1871, 1881, 1891, 1901, and 1911.

begun or constructed since the last preceding quadrennial appraisement.¹¹³

At an election held September 3, 1912 the constitution was amended so that "laws may be passed providing for the imposition of taxes upon the production of coal, oil, gas, and other minerals."¹¹⁴

OKLAHOMA

The State of Oklahoma is an important producer of minerals, principally coal, petroleum, natural gas, and zinc. The value of the output was \$53,614,130 in 1912, \$80,150,820 in 1913, and \$78,744,447 in 1914.¹¹⁵

The policy of Oklahoma has been to levy state taxes upon gross product and also a property tax for state, county, and local purposes upon all improvements. The Constitution authorizes the legislature to levy gross revenue, income, production, or other specific taxes.¹¹⁶ Taxes upon gross production have been supported by the courts as being taxes upon business and not upon property.¹¹⁷

In valuing non-producing mineral lands the assessors are required to consider and appraise minerals and mineral rights.¹¹⁸

The tax upon gross production is a percentage of the gross receipts after deductions are made for royalties. The important features of the present law were first enacted May 26, 1908,¹¹⁹ and were amended in 1909.¹²⁰ In 1910 a new statute was enacted and the rates or percentages were changed.¹²¹ The early laws taxing gross receipts specified coal as well as other mineral products.

The law was amended again in 1913,¹²² in 1915,¹²³ and also by the legislature in 1916.¹²⁴ The law of 1915 provided that the tax levied should be in lieu of any other taxes that might

¹¹³*Laws of Ohio*, 1911, sec. 5562.

¹¹⁴Constitution, Art. XII, sec. 10.

¹¹⁵*Mineral Resources of the United States*, 1914, United States Geological Survey, p. 32.*

¹¹⁶Constitution, Art. X, sec. 12.

¹¹⁷154 Pacific 362, (1916).

¹¹⁸*Revised Statutes*, 1910, chap. 72, sec. 7304.

¹¹⁹*Laws of Oklahoma*, 1908, chap. 71, pp. 640-645.

¹²⁰*Ibid.*, 1909, chap. 39, pp. 624-626.

¹²¹*Ibid.*, 1910, chap. 44, pp. 65-70.

¹²²*Ibid.*, 1913, pp. 640-643.

¹²³*Ibid.*, 1915, pp. 180-183.

¹²⁴*Ibid.*, 1916, pp. 102-110.

be levied and collected on an ad valorem basis upon the equipment and machinery in and around any well or mine and used in the actual operation of such well or mine. It has been held that the law is not for the purpose of exempting the equipment and machinery from taxation but to permit the levying of a gross production tax in lieu of any other tax that might be levied and collected on such property upon an ad valorem basis. This is not an exemption from taxation as prohibited by the constitution of Oklahoma.¹²⁵

The law of 1908 provided for a tax of 2 per cent on the gross proceeds of coal mines, the law of 1909 reduced the tax to one-half of one percent, and in the law of 1915 coal mines are not specified. The rate on petroleum and natural gas has also been changed, the rate in 1909 having been one-half of one per cent, in 1913 three-fourths of one per cent, and in 1915 two per cent, while in 1916 the rate was increased to three per cent. the tax on metalliferous mines has undergone practically no change, the rate in 1909 having been one-half of one per cent the same as in 1916.

In considering the power of the legislature to distinguish, select, and classify objects of taxation the court held that the legislature has a wide range of discretion. While the classification must be reasonable there is no precise rule of reasonableness and there cannot be an exact exclusion or inclusion of persons and things. The classification adopted must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. A statute levying one rate of tax on oil and gas and a lesser rate on ores bearing lead, zinc, jack, gold, silver, copper, or asphalt, and which omits a gross production tax on coal, is not repugnant to the provision of the constitution to the effect that taxes shall be uniform upon the same class of subjects. Mining property or the business of mining may be placed in a class by itself and taxed by some method peculiarly appropriate to that class, and the legislature may arrange and divide the various subjects of taxation into various classes, providing the tax is uniform upon all those belonging in the same class and upon which it operates.¹²⁶

¹²⁵In re Gross Production Tax Wolverine Oil Co., 154 Pacific 362, (1916).

¹²⁶*Ibid.*, p. 362.

The taxes upon gross production are levied and assessed by the State Auditor. According to the law of 1916 the royalty interest is taxed under the gross production tax, the owner of the royalty interest paying the tax. As previously noted the gross production tax is in lieu and in full of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to the minerals or the mining rights and privileges, upon the machinery, appliances, and equipment used in and around the property in producing the mineral, and upon the product during the tax year in which it is produced. Any other rights in the property and mineral in storage the year following its production are assessed and taxed as other property in the taxing district.¹²⁷

The graduated land tax has a tendency to restrict the quantity of mineral land controlled by mining interests.¹²⁸

PENNSYLVANIA

The value of the mineral output of Pennsylvania greatly exceeds that of any other state, the value having been \$445,799,653 in 1912, \$506,466,759 in 1913 and \$452,374,085 in 1914.¹²⁹ The most important products are coal, petroleum, and natural gas.

In 1844 Pennsylvania enacted laws regulating assessment of property, and these have continued to be the principal features of the laws which have controlled the valuation of mines and mineral lands. In 1857 it was held that coal and land could be assessed separately.¹³⁰

The legislature enacted a law August 25, 1864 levying a tax upon railroad and navigation companies on the tonnage carried, the rate varying with the character of the commodity. The rate on the product of mines, quarries, and clay beds, in the condition in which the product was taken from the ground, was two cents a ton.¹³¹

In 1868 transportation companies having the right to mine, purchase, or sell anthracite or having the right to lease from or to parties the lands or mines from which anthracite is taken

¹²⁷*Laws of Oklahoma*, 1916, p. 104.

¹²⁸*Infra*, p. 108.

¹²⁹Mineral Resources of the United States, 1914, p. 32.*

¹³⁰*Logan v. Washington Co.*, 29 Pa. 373.

¹³¹This law was declared unconstitutional in 1872. See *Reading R. Co. v. State of Pa.*, 15 Wall. 232, (1872).

were required to pay a state tax of four cents a ton upon all coal mined or purchased. This tax was in lieu of other state taxes including the tax upon the transportation of coal.¹³²

The courts held that mined coal is personal property when in the mine as well as when stored on the surface.¹³³

It is interesting to note that, in chartering the Miners' Hospital and Asylum of Schuylkill County on April 5, 1870, the Pennsylvania Legislature imposed a tax of one cent upon each ton of coal transported over the railroads in the county. This tax was to provide funds for the erection, maintenance, and endowment of the hospital and the owners of the coal were authorized to charge one cent more than the price at which the coal had been sold under contract. This tax was to be collected until, in the opinion of the Board of Managers of the Hospital, sufficient had been collected to purchase the necessary grounds, erect and furnish the buildings, pay the current expenses and create a permanent fund the interest of which would be sufficient to provide for the yearly expenses of the Hospital. The Legislature specified however that the total amount collected should not exceed five hundred thousand dollars.¹³⁴

By the Act of April 24, 1874, the legislature levied a franchise tax upon every corporation operating in Pennsylvania and possessing the corporate right or privilege to mine or to purchase or sell coal. This tax upon the corporate franchise was payable into the treasury of the commonwealth and was at the rate of three cents upon each ton (2240) of coal so mined or purchased, "provided that the amount of coal consumed in the transaction of its business by any such company" should not be "included in its return and provided that the tax should not be payable more than once in respect to the same ton of coal." This statute was supported by the courts in several decisions.¹³⁵ However by an Act of June 7, 1879, the law was amended, and the rate was continued at three cents per ton until July 1, 1880; thereafter it was one cent per ton until July 1, 1881. The tax was entirely discontinued after the latter date.

The mines of the state are taxed locally upon real and personal property. An annual state tax is levied upon the capital stock of corporations, and upon corporate loans. The

¹³²*Laws of Pennsylvania*, 1868, pp. 110-111.

¹³³*Lykens Valley Coal Co. v. Dock*, 62 Pa. 232 (1869).

¹³⁴*Laws of Pennsylvania*, 1870, p. 920.

¹³⁵*Kittaning Coal Co. v. Commonwealth*, 79 Pa. 100, (1875).

principal problem in the taxation of mines in Pennsylvania has been that of valuation.¹³⁶

In 1909 the Pennsylvania legislature appointed a Joint Committee to make a report upon taxation of mines. This committee drafted a bill favoring the taxing of anthracite at the mine, but no action was taken until 1913 when an act was passed providing that anthracite should be taxed two and one-half per cent of the gross value per ton at the mine when ready for market.¹³⁷ The mining companies questioned the constitutionality of this act and the court held that the law was in violation of the constitutional provision directing that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax" as it makes an arbitrary distinction and discrimination between the producers of anthracite and those mining bituminous coal, the latter not being subjected to this special tax. This was the opinion of the court given in October 1915 on the Act of 1913.¹³⁸ The legislature of 1915 had revised the law and the new law had been signed by the Governor on June 1, 1915. Under the new law the tax rate is two and one-half percent as before and is levied only on anthracite, the essential difference from the old law being in the plan of collecting the tax and distributing the proceeds.^{138a}

SOUTH CAROLINA

South Carolina has never ranked as an important producer of minerals. Prior to 1912, phosphate mining was relatively of considerable importance, but recently the industry declined. In

¹³⁶*Infra*, chap. VII.

¹³⁷*Laws of Pennsylvania*, 1913, Act. 374.

¹³⁸*Commonwealth v. Alden Coal Co.*, 96 Atlantic 246.

^{138a}The correspondent of *Coal Age* writes on November 25, 1916, as follows: "So far as action on the part of the state is concerned the 1915 act is as dead a letter as the anthracite tax law of 1913, which was declared unconstitutional by the Supreme Court. The 1915 anthracite tax law was so framed, it was thought, that the faulty features of the prior law would not invalidate it. It provides the same rate of tax, and under its provisions the coal companies should have started filing their reports with the auditor general with the beginning of the present year. Attorney General Brown, however, when the time for filing of the reports arrived, notified the auditor general that he would advise him regarding the matter. This advice, it is said, has not yet been given. No reports have been filed and no attempt has been made to collect any of the tax. While the state officials interested will not say the 1915 act is as defective

1912, the value of the total mineral product was \$1,606,989 while in 1913 it was \$1,464,150 and in 1914, \$1,414,294.¹³⁹

The Constitution of 1868 provided for uniform taxation except on mines, the proceeds only of which were to be taxed.¹⁴⁰ The Constitution of 1895 made a similar limitation upon the taxation of mines.¹⁴¹

Personal property used in connection with mines and all land not actually mined is assessed and taxed as other personal property and real estate. Land actually mined is not taxed except upon the gross proceeds which are determined by the cash market value of the material mined.¹⁴²

UTAH

The Mormons entered Utah in 1847, but paid no attention to mining in the early days, although it is claimed that they soon realized the great mineral wealth of the area surrounding the fertile valleys in which they had located.¹⁴³

Utah was organized as a territory December 9, 1850. The so-called "Utah War" of 1857 brought into the district a considerable number of United States troops. Later, in 1862, a detachment of California volunteers was located at Salt Lake and these soldiers, experienced in California mining, began prospecting in the mountains near by. The first mineral discovery was reported in Bingham canyon in 1863. Other discoveries soon followed and mining became of great importance. In 1872

constitutionally as is the act of 1913, it is generally believed by lawyers that the newer act is no better from a legal standpoint than the 1913 act. So far, the coal companies have not attacked the law, and it is conceded in some quarters that they will not do so. Some of the officials at the capitol, who do not care to be quoted, as their opinion in the matter will probably be asked by the governor, are of the belief that there never will be any state tax collected on anthracite in Pennsylvania until there is a general law relating to bituminous coal, oil, and natural gas. Efforts to put through such a measure have been under way ever since Governor Tener's tax commission made numerous recommendations four years ago on means of increasing the revenues. This state, Ohio, and West Virginia have never been able to come to an understanding regarding a tax on soft coal, oil, and gas. For this reason it has been deemed not advisable to tax natural resources of western Pennsylvania which are found also in adjoining states." (*Coal Age*, 1916, X, 902).

¹³⁹*Mineral Resources of United States*, 1914, p. 32.*

¹⁴⁰Constitution of 1868, Art. IX, sec. 1.

¹⁴¹Constitution of 1895, Art. X, sec. 1.

¹⁴²*Acts of Gen. Assembly*, 1881-1882, sec. 196.

Utah enacted laws controlling locations upon mineral lands. Taxation laws were enacted in 1878.

The Constitution was adopted November 5, 1895 and Utah was admitted to the Union January 4, 1896. The taxation of the net proceeds is authorized by the Constitution.¹⁴⁴ In 1899 the assessment of the net proceeds was transferred to the State Board of Equalization by action of the state legislature. In 1905 when the question was carried to the state supreme court, it was held that, under the Constitution, the State Board of Equalization could not legally assess the net proceeds of mines. In 1908 the Constitution was amended so that "the net annual proceeds of all mines and mining claims" shall be assessed and taxed by the State Board of Equalization.¹⁴⁵

An effort was made in 1911 to revise the system of taxation in general and various constitutional amendments were proposed including one removing the provision requiring the State Board of Equalization to tax mining machinery, surface improvements, and net proceeds of mines and removing the restriction that claims and land shall be taxed at the price paid the United States for the land.

All of these amendments were defeated.¹⁴⁶

The details of the law now in effect in Utah are given in Chapter IV. The State Board of Equalization recommended in 1912 that the law taxing the net proceeds of mines be made more specific and that taxes and insurance be legally deductible from the net proceeds. The Attorney-General also pointed out defects in the law and urged that the proposed amendment be resubmitted.¹⁴⁷

According to the report of the State Board of Equalization the important points of difference between the mining companies and the State Board of Equalization have been adjusted and the lawsuits which resulted from controversies¹⁴⁸ over the

¹⁴³*United States Geological Survey, Professional Paper, No. 77, p. 16.*
See also Bancroft, *History of Utah*, p. 741.

¹⁴⁴Art. XIII, sec. 4.

¹⁴⁵*Ibid.*, sec. 4.

¹⁴⁶It was claimed that the State Board could not make personal inspection of mining property as frequently as the county assessor could.

¹⁴⁷*Report of Attorney-General, 1911-12, p. 9.*

¹⁴⁸In a suit by the Utah Copper Co. to recover an excess of taxes levied by the Board of Equalization and collected by the county treasurer, the Judge in the U. S. District Court instructed the jury to find for the mining company, the amount decreed to be returned, amounting to

interpretation of the law have determined judicially the various points at issue. "So long as the law makers of the State shall consider that the assessment of the net proceeds of a mine fairly represents its value for assessment purposes, a fair and uniform assessment may be had under the present law."¹⁴⁹ Additional data on mine taxation in Utah may be found in the references given below.¹⁵⁰

On November 7, 1916 there was submitted to the voters of Utah for their approval an amendment to the Constitution, being a proposed change of Article XIII which relates to taxation and revenue. The most important part of the proposed amendment follows: "In addition to the assessment of the surface grounds, improvements and machinery of mines and mining claims, all mines and mining claims producing net proceeds shall be taxed at a value not to exceed three times such net products." This amendment was defeated at the polls.

VIRGINIA

Virginia does not rank high as a producer of minerals, the value of the output having been \$14,995,842 in 1912, \$17,178,580 in 1913, and \$16,400,347 in 1914.¹⁵¹

The general property tax has been employed in the taxation of mines and the assessing of mines and mineral lands under special rules is authorized by the Constitution.¹⁵² The legislature by an Act amended in 1910 has prescribed how the

\$29,444. The point at issue was the allowance of expenditures in the development of mining properties and the providing of facilities for the handling and reducing of the ores. The company held that these expenditures were properly to be deducted from the gross revenue, before the net profits could be established. *Engineering and Mining Journal*, 1913, XCV, 1119.

¹⁴⁹Report State Board of Equalization, 1913-1914, p. 60.

¹⁵⁰Miscellaneous articles and notes on Utah mine taxation:

Thomas, J. J. Taxation of mines in Utah and Nevada. *Proceedings of National Tax Association*, 1908, II, 431.

Bennion, H. Administrative problems, work of state commissions and state tax commissions in Utah. *Ibid.*, 1914, VIII, 111.

Paterson, O. S. Report of special tax commission of Utah. *Ibid.*, 1912, VI, 425.

Unsigned articles and notes:

Engineering and Mining Journal, LXXXV, 229, 623; XCV, 492, 119; XCVI, 1044.

¹⁵¹*Mineral Resources of United States*, 1914, p. 32.*

¹⁵²Constitution of 1902, Art. XIII, sec. 172.

appraisal shall be made.¹⁵³ The assessment was formerly made every five years by the general assessors; now an annual appraisal is made by the commissioner of revenues in the district where the property is located, with the assistance of a special assessor appointed by the Corporation Commission.¹⁵⁴ As a result a higher valuation of mineral land has resulted. In 1906, the 956,155 acres of mineral land then assessed bore an assessment of \$8.13 per acre; in 1911, the acreage was 2,438,887 which was rated at \$11.51 per acre. This was an increase of 42 percent which may be compared with an increase in valuation of 28 percent for farm lands.¹⁵⁵

The experience of Virginia may well be expressed by the statement of the Joint Committee on Tax Revision reporting to the Governor of Virginia, November 1, 1914, in accordance with instructions of the legislature of 1914, as follows:

"Under our general property tax system, the mineral when produced pays on an assessment greater than its value and the undeveloped land out of all proportion to its productive value. Any other system should obviously take no more tax from the mineral, and would necessarily give up all or nearly all the tax upon undeveloped land. Nevertheless, the counties and even the Commonwealth can not forego some assessment against these lands."¹⁵⁶

WEST VIRGINIA

West Virginia is an important producer of minerals, ranking second among the states in the value of the mineral output. The principal mineral products are coal, petroleum, and natural gas. In 1912 the output was valued at \$123,847,812, in 1913 at \$143,640,633, and in 1914 at \$134,071,803.¹⁵⁷

The Constitution provides that "taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value."¹⁵⁸

The essential features of the laws now in force are that real property is assessed locally at its actual value; personal property, including machinery and stored minerals, is assessed at its actual value; leaseholds in coal, oil, gas, or other mineral

¹⁵³*Code of Virginia*, sec. 437a.

¹⁵⁴*Laws of 1912*, p. 162.

¹⁵⁵*Report of Joint Committee on Tax Revision*, Virginia, 1914, p. 29.

¹⁵⁶*Ibid.*, p. 30.

¹⁵⁷*Mineral Resources of United States*, 1914, p. 32.*

¹⁵⁸Art. X, sec. 1.

substances are assessed at their actual value; mineral rights when owned separate from the surface are assessed at actual value to their owner. When land increases or diminishes as much as \$100 on account of the development or exhaustion of minerals, a corresponding change is made in the assessed valuation.¹⁵⁹

The Tax Commission of 1902, appointed to investigate the tax system of the State, reported to the legislature recommending that a production tax be levied amounting to one-third of a cent per ton on each ton of coal manufactured or produced, the proceeds of this tax to be used for State purposes alone.¹⁶⁰

The attempts made during the session of the legislature in 1903 to enact such a tax on production failed. Again in 1907 the State Tax Commissioner recommended¹⁶¹ to the legislature that a production tax be employed by the State. No action was taken. The reasons assigned by the Tax Commission¹⁶² for the proposed imposition of the production tax were as follows:

"FIRST: The nature of this business is such, that the State has felt called upon to incur a very considerable annual expense, in order that the business may be carried on with profit to the operators, and with comparative safety to the miners. To this end a law has been passed in the interest of this business. Nine inspectors were appointed, and salaries and expenses are paid by the State.

"SECOND: Three Miners' Hospitals have been established, and buildings erected in mining districts of the State, primarily for the purpose of caring for, and treating persons, principally miners, who may be injured in and about the operations of the mines. The expense of maintaining these hospitals is very considerable every year.

"THIRD: The State at very considerable expense maintains its militia or national guard. It may be said that in almost every case where it is found necessary to call out this guard for the preservation of the domestic peace and for the protection of property, it is owing to disturbances in the mining regions of the States, growing out of difficulties or disputes between the operators of the mines and those in their employ.

"FOURTH: Investigation shows that the criminal charges are much larger in counties where large mining operations are carried

¹⁵⁹*Code of 1906*, Sec. 723, 687, 688, 794.

¹⁶⁰Townsend, T. C. Taxation of coal, oil, and gas. *Proceedings National Tax Association*, 1908, II, 395.

¹⁶¹*Ibid.*, p. 398.

¹⁶²*Second Biennial Report, West Virginia Tax Commission*, 1907-8, p. 32.

on, than in other counties. This results, it is believed, from the large influx into such counties of men to work in the mines.

"FIFTH: It will be admitted, that miners and others employed about the mines, pay but little tax, either into the State, or county treasury; and that very often the operators or owners of the mines reside in other states, and pay little or no taxes in this State. The number of children in mining communities is generally large in proportion to the population. For work in the mines, large numbers of laborers, many of them illiterate, are brought in by the operators, and the burden of educating the young is thrown upon the State, and the community. The operators and owners of the mines have a special interest in the education of these young people, and being responsible for their being in the State, it is thought not unjust, partly in consideration of this fact, that the small tax should be paid."

In 1905 the legislature enacted the law taxing leaseholds. This law was held to be constitutional.¹⁶³

The Tax Commission of 1902 endeavored to procure legislation providing for a production tax of one-half cent per barrel of oil, but without success. The difficulty of appraising an oil or gas property is apparent and in the opinion of the West Virginia Tax Commission a production tax is the "most feasible, scientific, and common-sense method" that can be devised.¹⁶⁴

On the contrary Governor Hatfield went on record¹⁶⁵ in a special message to the legislature, February 18, 1915, as not advocating a production tax on coal, oil, and gas.¹⁶⁶

WISCONSIN

Mineral lands and mines of Wisconsin have been subject to taxation only under the general property tax and the income from mines has been taxable as other income under the income tax. The principal problem has been that of valuation and appraisal for the purpose of taxation.

¹⁶³Harvey Coal & Coke Co. v. C. W. Dillon, 59 W. Va. 605, (1905).

¹⁶⁴Prospective oil and gas is not real estate until brought to the surface. Carter v. Tyler, 32 S. E. 216, (1899).

¹⁶⁵Public, 1915, XVIII, 206.

¹⁶⁶Miscellaneous references on mine taxation in West Virginia:

Blue, F. O. Notes on mine taxation in West Virginia, *Coal Age*, 1913, IV, 713.

White, A. B. Taxation of coal, oil, and gas. *Second Biennial Report, W. Va. State Tax Commission*, 1907-8, p. 18.

Editorial. Values assessed without seeing the properties. *Coal and Coke Operator*, 1913, XXXII, 47.

Unsigned. How West Virginia coal mines pay taxes. *Black Diamond*, 1916, LVII, 347.

Lead ore was discovered in Wisconsin as early as 1682,¹⁶⁷ but lead mining was not begun actively on a substantial basis until Congress authorized¹⁶⁸ the sale of the lead lands of the Mississippi Valley in 1847. Iron ore was discovered in the Menominee Range in 1873, on the Gogebie Range in 1883, and on the Baraboo Range in 1900. Wisconsin was admitted to the Union May 27, 1848 and adopted the system of taxing all property upon the ad valorem basis. Broken minerals were taxed as personal property.¹⁶⁹

The law in effect now is in no important detail different from the law under which mines have been taxed since the state was organized, but the laws regarding the assessment and valuation have been made more specific.¹⁷⁰ In 1903 a law was enacted providing for the taxation of mineral rights.¹⁷¹

In 1897 a State Tax Commission was established¹⁷² and there has been since that date a reorganization and development of the taxing system of the State, with a tendency toward centralization.¹⁷³ The first assessment of mines for the Tax Commission was made in 1912. In 1914 this work was regularly authorized by law and it is now done by the State Geologist. The appraiser for the Tax Commission has the right to make a reassessment of any property apparently not fairly appraised. The local taxing units do not always use the valuation of the Geological Survey.

Royalties are taxed under the income tax.¹⁷⁴ At the present time there is no sentiment in Wisconsin in favor of a state tonnage tax. In 1912 the mineral output of Wisconsin was

¹⁶⁷Irving, R. D. Mineral resources of Wisconsin. *Trans. Amer. Inst. Min. Engrs.*, 1879, VIII, 498.

See also *Wisconsin Historical Collection*, XIII, 271-293; *Trans. Wisconsin Academy of Arts, Science, and Letters*, XIII, 188; *Geological Survey* (Hall), I, 73 (1862); Schoolcraft, H. R., *Narrative Journal of Travels*, Albany, 1821.

¹⁶⁸9 *U. S. Statutes at Large* 179.

¹⁶⁹Palmer v. Corwith, 3 Pinney 267, (1851).

¹⁷⁰*Infra*, chapter IV on laws now in force and chapter VII for details on valuation.

¹⁷¹*Laws of Wisconsin*, 1903, chap. 361; 1909, chap. 61; *Ibid.*, 1911, chap. 48, sec. 1042j.

¹⁷²*Ibid.*, 1897, chap. 340.

¹⁷³7th *Biennial Report of Wisconsin Tax Commission*, 1914, pp. 1-9.

¹⁷⁴*Laws of Wisconsin*, 1911, chap. 658, amended by Laws of 1913, chap. 27, 443, 487, 554, 615, and 720.

valued at \$14,192,287, in 1913 at \$12,452,480, and in 1914 at \$11,022,643,¹⁷⁵ practically 25 percent of the value being in zinc. In 1914 the mining corporations paid income tax upon a taxable income amounting to \$326,880. The average rate was .05452 and the total tax paid was \$17,820.47.¹⁷⁶ In 1915 a law was enacted specifying that lead and zinc mines shall be assessed annually at one-fifth of the market value of the ore mined during the preceding calendar year.¹⁷⁷

WYOMING

Wyoming has extensive deposits of coal, as well as other mineral resources of value, although the state has never ranked high among the mineral producers. In 1912 the value of the output was \$13,374,088, in 1913 it was \$13,682,091, and in 1914, \$12,417,752, the coal product representing nearly 90 percent of the total.¹⁷⁸

The Territory of Wyoming was organized July 25, 1868, and the state enacted laws for the location of mining claims December 16, 1870. In 1890 Wyoming was admitted to the Union and adopted a constitution which permitted the taxation of mines upon the gross production in lieu of taxes upon lands. Surface improvements of all mining property are taxed.¹⁷⁹ All coal lands from which coal is not being mined are assessed and taxed according to their value.¹⁸⁰

The legislature of 1903 provided for the taxation of mines and mineral lands upon the gross product¹⁸¹ as permitted by the constitution.

In 1909 the office of Commissioner of Taxation was created and the duty of appraising the value of the gross products of mines was assigned to him.¹⁸² The Report of the Commissioner

¹⁷⁵*Mineral Resources of the United States*, 1914, p. 32*.

¹⁷⁶*Seventh Biennial Report Wisconsin Tax Commission*, 1914, p. 109.

¹⁷⁷*Laws of Wisconsin*, 1915, chap. 388.

¹⁷⁸*Mineral Resources of the United States*, 1914, p. 32*.

¹⁷⁹Constitution, Art. XV, sec. 3.

¹⁸⁰*Ibid.*, sec. 2.

¹⁸¹*Laws of Wyoming*, 1903, chap. 81, sec. 1 to 6.

¹⁸²*Ibid.*, 1909, chap. 66. "The present method of the assessment of output of mines is unsatisfactory, and the law indefinite and conflicting. The present law should be so amended that there can be no question as to what shall be assessed and as to how it shall be assessed and the authority of the assessing board plainly and clearly set forth." *First Biennial Report of Commissioner of Taxation*, 1909-10, p. 19.

of Taxation for 1911-1912 shows¹⁸³ that the taxes on the output of mines amounted to \$38,894.51 in 1910; \$53,111.26 in 1911; and \$47,734.35 in 1912.¹⁸⁴

¹⁸³*Ibid.*, p. 68.

¹⁸⁴The value of the output in 1912 as reported by the United States Geological Survey was \$13,374,088. The lowest rate applied in any of the mining counties was 7.47; at this rate the tax paid should have been \$99,904.44.

CHAPTER IV

CONSTITUTIONAL AND STATUTORY ENACTMENTS

Constitutional Limitations

An examination of the constitutions of the states shows that no restraint has been placed upon the classification of property for taxation in Connecticut, Maryland, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, and Vermont.¹

Uniformity of taxation on all property in the same class is specified by the constitutions of Arizona, Colorado, Delaware, Idaho, Illinois, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, Virginia, and Wyoming.

The following states require uniform taxes on all classes of property: Alabama, Arkansas, California, Florida, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan (except that specific taxes are authorized), Minnesota, Mississippi, Missouri, Montana (except as specified), Nebraska, Nevada (except mines), New Jersey, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah (except mines), Washington, West Virginia, Wisconsin, and Wyoming.

The method of taxing mines is prescribed in the constitutions of Montana, Nevada, South Carolina, Utah, and Wyoming.

The legislatures of Michigan and Oklahoma are authorized by the constitution to levy and collect specific taxes. The legislature of Louisiana may impose license taxes upon the business of mining.

The constitutions of thirty-two states practically require a uniform method of valuing property for taxation.² The constitution of Virginia authorizes special and separate assessment of mineral lands. Unproductive coal land in Wyoming must be listed and taxed as provided in the constitution.

Most of the state constitutions specify that taxes shall be uniform and that all property, except as enumerated, shall be

¹*Proceedings National Tax Association*, 1911, V, 451.

²*Ibid.*, 1911, V, 451.

subject to taxation. The constitution of Idaho prescribes that taxes shall be uniform upon the same class of subjects, "provided the legislature may allow such exemptions from time to time as shall seem necessary and just."³

Certain of the Eastern states have no constitutional requirement that all property shall be taxed. The statutes of Vermont, in the absence of specific constitutional restrictions on exemptions, authorize municipalities to exempt mines from taxation for a period of ten years.⁴ In general, however, the present day tendency is rather to select mines as a special object for heavier taxation than to exempt them.

Specific reference to mines is made in the constitutions of the following states: Louisiana,⁵ Montana,⁶ Nevada,⁷ Ohio,⁸ Oklahoma,⁹ South Carolina,¹⁰ Utah,¹¹ Virginia,¹² and Wyoming.¹³

From time to time the legislatures of the various states have enacted laws providing for the taxation of mines, which laws have been held by the courts to be in conflict with the Federal or the State Constitution. Among the most important of the laws that have been held unconstitutional are the following:

In 1867, the Nevada law taxing proceeds of mines was declared unconstitutional.¹⁴

The Pennsylvania Act of 1864, levying a tax of two cents a ton on the product of mines, quarries, and clay-beds was held unconstitutional in 1872.¹⁵

Similarly, the tax collected of railroads in Maryland on the tonnage of coal handled was held unconstitutional in 1874.¹⁶

In 1885, the Michigan Supreme Court declared unconstitutional the law imposing a tax which discriminated between ore

³Idaho, Constitution, Art. VII, sec. 5.

⁴Vermont, Public Statutes, 1906, sec. 499.

⁵Constitution of Louisiana, Art. 229.

⁶Constitution of Montana, Art. XII, sec. 3.

⁷Constitution of Nevada, Art. X, sec. 1.

⁸Constitution of Ohio, Art. XII, sec. 10.

⁹Constitution of Oklahoma, Art. X, sec. 12.

¹⁰Constitution of South Carolina, Art. X, sec. 1.

¹¹Constitution of Utah, Art. XIII, sec. 4.

¹²Constitution of Virginia, Art. XIII, sec. 172.

¹³Constitution of Wyoming, Art. XV, sec. 2, 3.

¹⁴State v. Estabrook, 3 Nev. 156.

¹⁵Reading R. Co. v. State of Pa., 15 Wall. 232.

¹⁶State v. Cumberland & P. R. Co., 40 Md. 22.

smelted in the State and that shipped to smelters outside the state as being in restraint of interstate commerce.¹⁷

The Minnesota tonnage tax law of 1881 was declared unconstitutional in 1896.¹⁸

The Utah Act of 1899, placing the assessing of the net proceeds of mines with the State Board of Equalization instead of the county assessor was held to be unconstitutional in 1905.

A Louisiana Act of 1910 providing for a conservation fund and authorizing an annual license tax upon those engaged in the mining business was declared unconstitutional as the measure had been enacted by the legislature before the amendment to the Constitution, providing for such legislation, had been voted upon by the people of the state.¹⁹

The special tax on anthracite levied by the Pennsylvania Assembly in 1913 was declared unconstitutional in 1915.²⁰

Statutory Provisions

The following state legislatures in providing laws defining property have specified mines and minerals:

Alabama, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Minnesota, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

The following note specifically that mining rights shall be taxed to the owner if the title is separate from the surface: Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Minnesota, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Vermont, Virginia, West Virginia, and Wisconsin.

There is special legislation on the methods of taxing mines in the following states: Colorado, Idaho, Louisiana, Montana, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, Utah, Wisconsin, and Wyoming.

Rules for assessing and listing mining property are specified in the laws of Colorado, Connecticut, Idaho, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

¹⁷Jackson Min. Co. v. Auditor General, 32 Mich. 488.

¹⁸*Report of Auditor of State of Minnesota*, 1901-1902, p. vii.

¹⁹Etchison Drilling Co. v. Flournoy, 59 Southern 867, (1910).

²⁰Commonwealth v. Alden Coal Co., 96 Atlantic 246, (1915).

The conditions under which mining property may be exempt from taxation are given in the laws of Alabama, Maine, New Hampshire, and Vermont.

Constitutional and Statutory

Provisions by States

No attempt has been made to assemble all the constitutional provisions and statutory enactments that apply to the taxation of mining property as well as to other property, but rather to present those that are of particular importance in the study of the taxation of mining property.

ALABAMA

Constitutional Provisions

Uniformity. All taxes levied on property shall be assessed in exact proportion to the value of the property. (Art. XI, sec. 211).

The property of private corporations, associations, and individuals shall forever be taxed at the same rate. (Art. XI, sec. 217).

Franchise tax. The legislature shall provide for the payment of a franchise tax by corporations organized under the laws of Alabama, which shall be in proportion to the amount of capital stock. (Art. XIV, sec. 229). The legislature shall provide for the payment of a franchise tax by foreign corporations, the tax being based on the actual amount of capital employed in the state. (Art. XIV, sec. 232).

Statutory Provisions

Mines assessed. Real and personal property estimated at its full cash value by assessor upon information, inspection, or otherwise taking into consideration mines, minerals, quarries, or coal-beds and the amount and character of improvements. (*Code of Alabama*, 1907, chap. 45, sec. 2112).

Mineral rights assessed. Mineral interests when they have been severed from the soil by sale or otherwise, shall be separately assessed. (*Ibid.*, sec. 2112). Every separate or special interest in any land, such as mineral, when such interest is owned by a person other than the owner of the soil, shall be assessed. (*Ibid.*, chap. 45, sec. 2082).

Franchise tax. All domestic mining corporations pay annually a privilege tax varying from \$10. on paid-up capital

stock under \$10,000, to \$500 on paid-up capital over \$1,000,000. *Ibid.*, chap. 45, sec. 2361). Foreign mining corporations pay a franchise tax on capital employed in the state at the following rate, 25 percent on the first \$100, 5 percent on the remainder of the first \$1000 and then 1/10 percent on the remainder. (*Ibid.*, chap. 45, sec. 2491). In addition to the state tax, foreign companies pay a county tax equal to one-half the state tax.

Corporation tax. Shares of mining companies are assessed and taxes collected in the county where the company has its home office. The corporation property is assessed against the corporation; the shares are assessed in the name of the shareholder at their actual market value of the real and personal property of the corporation. The corporation pays for the shareholders, respectively, the tax assessed against the shares. (*Ibid.*, chap. 45, sec. 2082).

Exemptions. Pig iron remaining in the hands of the manufacturers on the first day of October of any year following immediately that in which it was produced is exempt from taxation. (*Ibid.*, chap. 45, sec. 2061).

ARIZONA

Constitutional Provisions

Uniformity. All taxes shall be uniform upon the same class of property. (Constitution, Art. IX, sec. 1).

All property not exempt shall be subject to taxation. (*Ibid.*, Art. IX, sec. 2).

Assessing. The manner, method, and mode of assessing, equalizing, and levying taxes shall be such as may be prescribed by law. *Ibid.*, Art. IX, sec. 11).

Production taxes. The legislature may provide for the levy and collection of production taxes. (*Ibid.*, Art. IX, sec. 12).

Statutory Provisions

Property. All property of every kind shall be subject to taxation but double taxation is not permitted. (*Revised Statutes*, 1913, Title 49, chap. IV, sec. 4846). Real estate includes ownership of, or claim to, or possession of, or right to possession to, any land or patented mine within the state. (*Ibid.*, sec. 4847). "Personal property" includes any interest or equity in or valid claim to non-patented claims, either lode or placer. (*Ibid.*, sec. 4847).

Assessing. Real estate and improvements shall be assessed

separately. (*Ibid.*, sec. 4847). All taxable property must be assessed at its full cash value. (*Ibid.*, sec. 4849).

Corporations. An annual registration fee of \$15 is charged for state purposes. (*Ibid.*, sec. 2274).

ARKANSAS

Constitutional Provisions

Property. All property subject to taxation shall be taxed according to its value. (Constitution, Art. XVI, sec. 5).

Uniform assessment. The general assembly shall provide by law for the assessment of property according to its value, so that the assessment shall be equal and uniform throughout the State. (*Ibid.*, sec. 5).

Statutory Provisions

Property. The term "real property and lands" includes not only the land itself, but also all improvements, and all rights and privileges belonging thereto. (*Statutes of Arkansas*, 1904, chap. 137, sec. 6872). All property, real and personal, shall be subject to taxation. (*Ibid.*, sec. 6873).

Capital-stock tax. All corporations pay to the State for State purposes a tax, levied on the right to exist as a corporation, at the rate of one-fifteenth of one percent on the outstanding capital stock employed in the State. (*Laws of Arkansas*, 1913, Act 122, p. 518).

CALIFORNIA

Constitutional Provisions

Uniformity. All property shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. Constitution of California, Art. XIII, sec. 1).

Exemptions. The power of taxation shall never be surrendered or suspended by any grant or contract. (*Ibid.*, Art. XIII, sec. 6).

Incomes. Incomes may be taxed as prescribed by law. (*Ibid.*, Art. XIII, sec. 11).

Franchises. All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per cent each year, and the taxes collected thereon shall be exclusively for the benefit of the state. The rates of taxation shall remain in force until changed by the legislature, two-thirds of all the members of each of the two

houses voting in favor thereof. (*Ibid.*, sec. 14. The rate in this section was changed by the legislature in 1913 and in 1915).

Statutory Provisions

Uniformity. All property, not exempt, is subject to taxation, but nothing in the code shall be construed to require or permit double taxation. (*Code of California*, Title IX, chap., sec. 3607).

Assessment. All taxable property must be assessed at its full cash value. (*Ibid.*, Title IX, chap. III, sec. 3627).

Mining property. The term "real estate" includes: All mines, minerals and quarries in and under the land and all rights and privileges appertaining thereto. (*Ibid.*, Title IX, chap. II, sec. 3617).

Corporation taxes. Every corporation doing intrastate business within the state of California shall procure annually from the secretary of state a license authorizing the transaction of such business and shall pay therefor a license tax. This tax shall be graduated according to the authorized amount of capital stock. When the authorized capital stock does not exceed ten thousand dollars, the tax shall be ten dollars; when the authorized capital stock exceeds ten million dollars the tax shall be one thousand dollars. All corporations having no capital stock shall pay an annual tax of ten dollars. (*Laws of California*, 1915, chap. 190).

Shares of stock of domestic corporations shall be exempt from taxation. All property belonging to corporations shall be taxed as is other property. (*Code of California*, Title IX, chap. I, sec. 3608).

Corporations shall pay to the state for state purposes a tax on the actual cash value of their franchises.

COLORADO

Constitutional Provisions

Uniformity. "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." (Constitution of Colorado, Art. X, sec. 3).

Exemptions. All laws exempting from taxation property other than hereinbefore mentioned shall be void. (*Ibid.*, Art. X, sec. 9).

Statutory Provisions

Assessing property in general. All taxable property shall be listed and valued each year, and shall be assessed at its full cash value. (*Revised Statutes*, 1908, sec. 5529). In assessing property, except as provided, the market value shall be the guide. (*Ibid.*, sec. 5591).

Mining property. Real estate includes all lands, all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements. (*Ibid.*, sec. 5540). The possessory right to unpatented and non-producing mines is subject to assessment. (*Laws of Colorado*, 1915, chap. 138). All mines and mining claims bearing "gold, silver, lead, copper, and other precious metals or valuable minerals, and possessory rights therein" are divided into two classes,—producing and non-producing. Those having a gross annual output of less than five thousand dollars are classed as non-producing, all others as producing. (*Revised Statutes*, 1908, sec. 5618). Producing mines of coal, iron, asphaltum and quarries are assessed in the same manner as other property. (*Ibid.*, sec. 5625).

All producing metal mines or possessory rights therein are valued for taxation at one-fourth of their gross production unless their net output exceeds one-fourth in which case the net is taken. (*Laws of Colorado*, 1915, chap. 138). The net proceeds shall be determined by deducting from the gross value of the ore produced, the actual cost of extracting from the mine, not including the salaries of officers not actively and consecutively engaged; the actual cost of transportation to the place of reduction or sale; and the actual cost of treatment, reduction or sale. (*Laws of Colorado*, 1915, chap. 138).

The surface improvements of all mines are taxable as is other property. (*Revised Statutes*, 1908, sec. 5621).

Any number of contiguous claims owned or operated as one property by the same person, persons, association or corporation, the gross production of which shall be more than \$5000 per annum, shall be deemed and considered one producing mine for the purposes of taxation. (*Laws of Colorado*, 1915, chap. 138).

Corporations. Domestic corporations pay for state purposes a tax of two cents upon each one thousand dollars of authorized capital stock. (*Revised Statutes*, 1908, sec. 5595).

Foreign corporations, in addition to other taxes, shall pay a license fee of two cents upon each one thousand dollars capital stock, represented by its property and assets in the State. (*Laws of Colorado*, 1911, chap. 260).

CONNECTICUT

Constitutional Provisions

Nothing specific on mines and nothing on taxation.

Statutory Provisions

Uniformity. All property not exempted shall be taxed. (*Public Acts*, 1909, chap. 97, p. 1024).

Mining property. Quarries, mines, and ore beds shall be liable to taxation. Whether owned in fee or leased, they shall be set in the list separately at their present true and actual valuations and, if owned by a corporation, the whole stock property and franchise shall be set in the list of the town where such quarry, mine or ore bed is. (*Ibid.*, p. 1024).

Corporation license. Shares of stock in mining and oil companies may not be sold until a financial statement is filed with the Secretary of State. A fee of twenty-five dollars is required. This applies to both foreign and domestic companies; however, companies operating wholly within the State are exempt. (*Ibid.*, 1911, chap. 232).

DELAWARE

Constitutional Provisions

Uniformity. All taxes shall be uniform upon the same class of subjects. (Constitution, Art. VIII, sec. 1).

Exemptions. The general assembly may by general laws exempt from taxation such property as in the opinion of the general assembly will best promote public welfare. (*Ibid.*, sec. 1).

Statutory Provisions

Franchise tax. An annual franchise tax is levied upon corporations, the tax varying from \$5 on a capitalization of \$25,000 to \$50 on \$1,000,000 with an addition of \$25 for each additional million dollars or part thereof. (*Laws of Delaware*, 1915, chap. 6, sec. 105). Mining corporations, fifty percent of whose capital stock actually paid in is invested in business carried on within the state, and which is subject to a license tax for carrying on such business, are exempt from this tax. Mining companies not

having fifty percent so invested but having a part of the capital stock invested in the state, are entitled to a deduction of the value of the real and personal property used in mining in the state, from the amount of the capital stock issued and outstanding.

Property tax. There is no state levy on general property. All real property, not exempt, is subject to taxation by the local units. Real and personal property are to be assessed at their true value. (*Revised Code*, chap. X, sec. 11).

FLORIDA

Constitutional Provisions

Uniformity. The legislature shall provide for a uniform and equal rate of taxation. Constitution, Art. IX, sec. 1).

Assessment. The legislature shall prescribe such regulations as shall secure a just valuation of all property, both real and personal. (*Ibid.*, sec. 1).

Statutory Provisions

Property tax. All real and personal property not exempt shall be subject to taxation. (*Laws of Florida*, 1906, sec. 428).

Phosphate license. Owners and operators of phosphate plants in operation shall pay twenty-five dollars for every plant in operation. (*Ibid.*, sec. 453).

GEORGIA

Constitutional Provisions

Uniformity. All taxation shall be uniform on the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax. (Constitution, Art. VII, sec. 2).

Statutory Provisions

Property tax. Taxes are levied on the ad valorem value of property. (*Code of Georgia*, 1910, sec. 914).

Uniformity. All taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed. (*Ibid.*, sec. 6553).

Exemptions. All exemptions, other than those enumerated, shall be void. (*Ibid.*, sec. 6556).

All real and personal property, whether owned by individuals or corporations, is liable to taxation. (*Ibid.*, sec. 1002).

Mining rights. All persons owning any mineral interests less than the fee shall return the same for taxation and pay the same as on other property. (*Ibid.*, sec. 1008).

License. Each company doing business in the State shall pay ten dollars a year. (*Ibid.*, sec. 919). All corporations incorporated under the laws of Georgia shall, in addition to all other taxes now required by law, pay each year an annual license or occupation tax as follows: Capital up to \$10,000, the sum of \$5; from \$10,000 to \$25,000, the sum of \$10; the rate increases up to \$100 on a capitalization in excess of one million dollars. All foreign corporations doing business in the State pay a similar tax. (*Ibid.*, sec. 950 and 951).

IDAHO

Constitutional Provisions

Uniformity. Taxes shall be uniform upon the same class of subjects within the same jurisdiction, provided the legislature may allow such exemptions from time to time as shall seem necessary and just. Duplicate taxation of property for the same purpose is prohibited. (Constitution, Art. VII, sec. 5).

Corporations. The power to tax corporations or corporate property shall never be relinquished or suspended. (*Ibid.*, sec. 8).

Statutory Provisions

Property tax. Real property includes lands, improvements, fossils, and quarries in and under the land. (*Laws of Idaho*, 1913, chap. 58, sec. 6). Personal property includes equities and easements. (*Ibid.*, chap. 58, sec. 7). Mining companies pay locally taxes for state and local purposes on land, improvements, and machinery. (*Revised Code*, 1908, sec. 1863).

Assessing property. Mining claims not patented are exempt from taxation. (*Laws of Idaho*, 1913, chap. 58, sec. 4). All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral or metal deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof is used for other than mining purposes. That part of the ground used for other purposes shall be taxed at its value for such other purposes. (*Revised Code*, 1908, sec. 1863). Machinery and improvements on mines and mining claims are not exempt. (*Ibid.*, sec. 1863).

Net profits. In addition to property taxes on surface and improvements, all mines, patented and unpatented, pay a tax on net profits. (*Ibid.*, sec. 1863). To determine the "net profits", deductions are made from the gross receipts as follows:

The actual expenditure of money and labor in extracting the product from the mine, of transporting it to the mill, concentrator, or reduction works, and the conversion of the same into money or its equivalent, and also the deduction of all moneys expended for necessary labor, machinery and supplies needed and used in the mining operations, for the improvements necessary in and about the mine or claim, for reducing ores, for the construction of the mills and reduction works used and operated in connection with the mine or claim, for transporting the ore, and for extracting the metals and minerals therefrom; but the money invested in the mine, or improvements made during any year, except the year immediately preceding, must not be included. Such expenditures do not include the salaries or any portion thereof, of any person or officer not actually engaged in the working of the mine, or personally superintending the management. (*Ibid.*, sec. 1864).

Every person or corporation engaged in mining is required to file with the county assessor an annual statement, under oath, of net profits. (*Ibid.*, sec. 1865).

License tax. All mining companies owning productive mines, pay to the State a graduated (from \$10 on \$5,000 or less capitalization to \$150 for over \$2,000,000) license tax. (*Laws of Idaho*, 1912, chap. 6). Non-productive mining corporations are exempt.

ILLINOIS

Constitutional Provisions

Uniformity. Every person and corporation shall pay a tax in proportion to the value of property owned. (Constitution, Art. IX, sec. 1).

Franchises. The legislature shall have power to tax persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. (*Ibid.*, Art. IX, sec. 1).

Exemption. Exemption from taxation shall be by general law only. (*Ibid.*, Art. IX, sec. 3).

Personal property. "From and after the date when this section shall be in force the powers of the General Assembly over the subject matter of the taxation of personal property shall be as complete and unrestricted as they would be if sections one, three, nine, and ten of this article of the constitution did not exist; provided, however, that any tax levied upon personal property of the same class within the jurisdiction of the body imposing the same, and all exemptions from taxation shall be by general law, and shall be revocable by the General Assembly at any time." (*Ibid.*, Art. IX, sec. 14. Adopted November 7, 1916).

Statutory Provisions

Property tax. In valuing any real property in which there is a coal, or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair, voluntary sale for cash. (*Revised Statutes*, chap. 120, sec. 4).

Any mining right or the right to dig for or to obtain iron, lead, coal, or other mineral from land, when separated from the title to the surface, shall be taxable separately. (*Ibid.*, chap. 94, sec. 6 and 7).

Capital stock tax. Domestic corporations are subject to assessment on the excess value of capital stock over tangible property. The value of the capital stock is based on a consideration of the market value of the shares or on the value as reported to the State by the corporations, and on such other information as may be obtained. To the total value of the shares is added the bonded and other indebtedness except that incurred for current expenses. The equalized tangible value is deducted from this amount and one-third of the remainder is taxed for state and local purposes as is other property. (*Revised Statutes*, chap. 120).

INDIANA

Constitutional Provisions

Uniformity. The General Assembly shall provide for a uniform and equal rate of assessment and taxation of all property, both real and personal, excepting such only as shall be exempt by law. (Constitution, Art. X, sec. 193).

Statutory Provisions

Property tax. In valuing any real property on which there is a coal or other mine, or stone or other quarry, the same

if the land and the mine or quarry are owned by the same person, shall be valued at its true cash value. If the mine or quarry is owned or leased by a person other than the owner of the land, such mine or quarry and all improvements and leasehold and appurtenances shall be valued separately from the land according to the true cash value. (*Revised Statutes*, 1908, sec. 10259).

Capital stock excess. Every mining company must file annually a sworn statement of the amount of its capital stock. In all cases where the market value of the capital stock exceeds the value of the tangible property listed for valuation, then such excess value shall be subject to taxation. (*Ibid.*, sec. 10233, 10234).

IOWA

Constitutional Provisions

Uniformity. The general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same term shall not equally belong to all citizens. (Constitution, Art. I, sec. 6).

Corporations. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. (*Ibid.*, Art VIII, sec. 2).

Statutory Provisions

Assessing. All property subject to taxation shall be valued at its actual value, and shall be assessed at 25 percent of its actual value. (*Code of Iowa*, 1897, sec. 1305).

KANSAS

Constitutional Provisions

Uniformity. The legislature shall provide for a uniform and equal rate of assessment and taxation. (Constitution, Art. XI, sec. 202).

Statutory Provisions

Property tax. All property, real and personal, not expressly exempt, shall be subject to taxation. (*General Statutes*, 1909, sec. 9214).

Real estate includes not only the land but buildings, improvements, mines, minerals, quarries, mineral springs and wells, and rights and privileges appertaining thereto. (*Ibid.*, sec. 9215).

Where the fee to the surface of any tract or lot of land is in any person or persons, natural or artificial, and the right or title to any minerals therein is in another or in others, the rights to such minerals shall be valued and listed separately and the land and said right to the minerals shall be separately taxed to the respective owners. (*Ibid.*, sec. 9334). Reserves or leases not recorded in ninety days shall be void. (*Ibid.*, sec. 9334).

Assessing. The assessor, from actual view, from consultation with the owners or agent thereof and from such other sources of information as are within his reach shall determine the true value of the property in money. (*Ibid.*, sec. 9322).

Capital stock. Capital stock, undivided profits, and all other assets of corporations are subject to taxation as personalty. (*Ibid.*, sec. 9215).

KENTUCKY

Constitutional Provisions

Uniformity. Taxes shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax. (Amendment adopted November 2, 1915).

The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. (Amendment adopted November 2, 1915).

Assessing. Property shall be assessed at its fair cash value. (Constitution, sec. 172).

Exemptions. The power to tax shall not be surrendered by grant or contract. (*Ibid.*, sec. 175).

Statutory Provisions

Property tax. All property shall be subject to taxation and shall be assessed at its fair cash value. (Code of Kentucky, 1909, sec. 4020).

Real estate includes all lands and improvements thereon. (*Ibid.*, sec. 4022). Mineral rights or coal, oil, or gas privileges by lease or otherwise or any interest therein in Kentucky, other than the county in which said owners reside, or if they should reside out of the State, shall be listed for taxation personally in the county where situated. (*Ibid.*, sec. 4039).

License tax. An annual state license tax is imposed upon corporations amounting to 30 cents on each \$1000 of that part

of their authorized capital stock represented by property owned in the State. (*Ibid.*, sec. 4189 a—i).

LOUISIANA

Constitutional Provisions

Uniformity. Taxation shall be equal and uniform on all property in the same taxing district. (Constitution, Art. 225).

License tax. The General Assembly may levy license taxes. Those engaged in the business of severing natural resources, such as minerals and timber from the soil whether they thereafter convert them by manufacturing or not, may also be rendered liable to a license tax, but in this case the amount to be collected may either be graduated or fixed according to the quantity or value of the product at the place where it is severed. (Constitution of 1913, Art. 229). No political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes.

Statutory Provisions

Property tax. The term "property" includes all real estate, improvements, rights, personal property and shares of stock. (*Laws of Louisiana*, 1898, Act 170, p. 346). All property shall be valued at actual cash value. (*Ibid.*, p. 346).

License tax. Each person or association of persons, firms, or corporations pursuing the business of severing natural products, including all forms of timber, turpentine, and minerals including oil, gas, sulphur and salt from the soil shall pay an annual license tax amounting to one-half of one percent of the gross value of the total production, less the royalty interest accruing to the owner. The value of all products shall be computed at the place where they are taken from the soil. (*Ibid.*, 1912, Act 209, sec. 1 and 2).

A similar license tax may be imposed by the Police Juries of the several parishes, provided the amount of the license tax shall not exceed the amount, which is, or may be, similarly levied by the State of Louisiana. (*Ibid.*, 1914, Act 296, sec. 1).

MAINE

Constitutional Provisions

Uniformity. All taxes upon real and personal estate, shall be apportioned and assessed equally, according to the just value thereof. (Constitution, Art. IX, sec. 8).

Exemptions. The legislature shall never in any manner, suspend or surrender the power of taxation. (*Ibid.*, sec. 9).

Statutory Provisions

Property tax. Real estate includes the land, improvements, and all interests. (*Revised Statutes*, 1903, chap. 9, sec. 3). Mines of gold, silver or of the baser metals when opened and in process of development are exempt from taxation for ten years from the time of such opening. But this exemption does not affect the taxation of the lands or the surface improvements of the same at the same rate of valuation as similar lands and buildings in the vicinity. (*Ibid.*, chap. 9, sec. 6).

Corporations. Mining companies are taxed locally upon their property. Shares of capital stock in such corporations are not taxed to the owners. Bonds and other securities are taxed. (*Ibid.*, chap. 9, sec. 25).

MARYLAND

Constitutional Provisions

Uniformity. The General Assembly shall, by uniform rules, provide for separate assessment of land and classification and sub-classifications of improvements on land and personal property as it may deem proper; and all taxes thereafter provided to be levied by the state for the support of the general state government, and by the counties and by the City of Baltimore for their respective purpose, shall be uniform as to land within the taxing district, and uniform within the class or subclass of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy. (*Declaration of Rights*, Art. XV).

Statutory Provisions

Property tax. All property of every kind shall be assessed for the purpose of taxation. (*Code of Maryland*, 1911, Art. 81, sec. 2). Property shall be assessed at full cash value. (*Ibid.*, sec. 4). Shares shall not be taxed when the property they represent is taxed locally. (*Ibid.*, sec. 4).

Corporation tax. Every ordinary business corporation shall be subject to taxation upon its property, real and personal, which would be taxable in this State if such Corporation were a natural person and engaged in a similar business. (Acts of Maryland, 1914, chap. 324, sec 88-C).

Bonus tax. Every corporation of this State having a capital stock, except railroads and building or homestead associations, shall, at the time of incorporation, pay for the use of the State a bonus tax at the rate of twenty cents for every thousand dollars of the amount of its authorized capital stock, but in no case shall such payment be less than twenty dollars. (*Ibid.*, see 88-A).

Annual franchise tax. Every ordinary business corporation of Maryland shall pay annually to the State Treasurer an annual tax for its franchise to be a corporation graduated according to the capital stock. (*Ibid.*, sec. 88-D). Foreign mining corporations pay a license tax graduated according to the amount of capital employed in the State. (*Ibid.*, 1908, chap. 240, p. 53).

MASSACHUSETTS

Constitutional Provisions

Nothing specific on mines.

Statutory Provisions

Uniformity. All property shall be subject to taxation. (*Revised Laws*, 1902, chap. 12, sec. 2).

Capital stock. Domestic mining and quarrying companies pay semi-annually a tax of $1/20$ of one percent on the par value of the whole amount of capital stock. (*Ibid.*, chap. XIV., sec. 49). Foreign companies pay semi-annually $1/40$ of one per cent. In no case is the tax more than \$300. The value of the real and personal property is deducted from the par value of the stock.

Net profits. Domestic mining and quarrying companies are required to pay a tax of four percent upon net profits estimated from reports filed with the tax commissioner. (*Ibid.*, chap. XIV., sec. 51).

MICHIGAN

Constitutional Provisions

Uniformity. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as prescribed by law. (Constitution, Art. XIV, sec. 11).

Specific taxes. The State may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from

banking, railroad and other corporations hereinafter created. (*Ibid.*, Art. XIV, sec. 10).

Assessing. Property shall be assessed at its cash value. (*Ibid.*, Art. XIV, sec. 12).

Statutory Provisions

Property tax. All property real and personal, within the jurisdiction of the State, not expressly exempted, shall be subject to taxation. (*Compiled Laws of Michigan*, 1897, sec. 3824).

Real property includes all lands, buildings, fixtures, and appurtenances thereto, except as expressly exempted by law. (*Ibid.*, sec. 3825).

Assessing. Real property shall be assessed in the township or place where situated. (*Ibid.*, sec. 3826). Personal property includes moneys, annuities, royalties, shares, all interests in land, all improvements on leased lands, except where the value of the real property is also assessed to the lessee or owner of such buildings and improvements. (*Ibid.*, sec. 3831).

MINNESOTA

Constitutional Provisions

Uniformity. All taxes shall be as nearly equal as possible and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state. (Constitution, Art. IX, sec. 1). All real and personal property shall be subject to taxation at its true value in money. (*Ibid.*, Art. IX, sec. 3).

Statutory Provisions

Assessing. All property shall be assessed at its true and full value in money. (General Statutes, 1913, sec. 1987).

In valuing real property on which there is a mine or quarry, the same shall be valued at such a price as such property including the mine or quarry would bring at a fair voluntary sale for cash. (*Ibid.*, sec. 1987).

Real property includes the land itself, buildings, improvements, and all rights and privileges appertaining thereto, and all mines, minerals, quarries, fossils on or under the same. (*Revised Laws*, 1905, sec. 796). Minerals rights owned separately from the surface may be assessed and taxed separately from such surface rights. (*Laws of Minnesota*, 1905, chap. 161).

Classification and valuation of property. All real and personal property subject to a general property tax and not subject to any gross earnings or other lieu tax is hereby classified for purposes of taxation as follows:

Class 1: Iron ore whether mined or unmined shall constitute class one (1) and shall be valued and assessed at fifty (50) percent of its true and full value. If mined, it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located, other than the ore, shall be classified and assessed in accordance with the provisions of classes three (3) and four (4) as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located, and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot. (*Laws of Minnesota*, 1913, chap. 483).

Money and credits. "Money" and "credits" are hereby exempted from taxation other than that imposed by this act and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof. (*Laws of Minnesota*, 1911, chap. 285, sec. 1).

"Credits" shall mean and include every claim and demand for money or other valuable things, and every annuity or sum of money receivable at stated periods. (*Revised Laws*, 1905, sec. 798).

All taxes paid to the county treasurer under the provisions of this act shall be apportioned, one-sixth to the revenue fund of the State of Minnesota, one-sixth to the county revenue fund, one-third to the city, village, or town and one-third to the school district in which the property is assessed. (*Laws of Minnesota*, 1911, chap. 285, sec. 13).

MISSISSIPPI

Constitutional Provisions

Uniformity. Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. Property shall be assessed by uniform rules according to its value. (Constitution, sec. 112).

Corporations. The legislature may provide for a special mode of valuation and assessment of corporate property, but all such property shall be assessed at its true value. (*Ibid.*,

sec. 112). The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals. (*Ibid.*, sec 180).

Statutory Provisions

Assessing. Property shall be valued on a full cash basis. (*Code of Mississippi*, 1906, chap. 122, sec. 4268).

Corporations. Corporations pay a property tax on their lands which are assessed the same as land of individuals. The capital stock is assessed at market value and an allowance is made for property taxed. (*Ibid.*, sec. 4267).

MISSOURI

Constitutional Provisions

Uniformity. Taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. (Constitution, Art. X, sec. 3).

Property tax. All property subject to taxation shall be taxed in proportion to its value. (*Ibid.*, Art. X, sec. 4).

Exemptions. All laws exempting property, other than as enumerated, shall be void. (*Ibid.*, Art. X, sec. 7). The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly. (*Ibid.*, Art. X, sec. 2).

Corporation fee. All corporations upon organization under the laws of the State shall pay a graduated fee. (*Ibid.*, Art. X, sec. 21).

Statutory Provisions

Property tax. Taxes shall be levied on all property, real and personal, except as stated. (*Revised Statutes*, 1909, sec. 11334).

Assessing. All property of all mining corporations shall be assessed and taxed in their corporate names. (*Ibid.*, sec. 11357).

MONTANA

Constitutional Provisions

Uniformity. Taxes shall be uniform on the same class of subjects in the same jurisdiction. (Constitution, Art. XII, sec. 11). The legislature shall levy a uniform rate of assessment. All property shall be taxed at its true value. (*Ibid.*, Art. XII, sec. 1).

Licenses. The legislature may impose a license tax upon persons and corporations doing business in the State. (*Ibid.*, Art. XII, sec. 1).

Corporations. The power to tax corporations shall not be suspended. (*Ibid.*, Art. XII, sec. 7).

Mineral property. Mining claims including those containing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase from the United States shall be taxed at the price paid the United States therefor when used for mining purposes. Any part used for other purposes shall be taxed at its value for such other purposes as provided by law. (*Ibid.*, Art. XII, sec. 3).

All machinery used in mining and all property and surface improvements which have a separate value from such mines or mining claims shall be taxed as provided by law. (*Ibid.*, Art. XII, sec. 3). Annual net proceeds of all mines and mining claims shall be taxed as provided by law. (*Ibid.*, Art. XII, sec. 3).

Statutory Provisions

Property tax. All property is subject to taxation except as exempt. (*Revised Code of Montana*, 1907, sec. 2498).

Real estate includes all mines, minerals and quarries in and under the land. (*Ibid.*, sec. 2501). Improvements on mining claims are not exempt from taxation. (*Ibid.*, sec. 2570).

Property tax. All property is subject to taxation except proceeds at the same rate applied to property. The local assessors determine the net proceeds by deducting from the value of the output the actual cost of extracting from the mine, the actual cost of transportation to the place of reduction or sale, the actual cost of reduction or sale, and the cost of repairs and necessary construction about the mine, mill, and reduction works. No deduction is made for the salaries of officers not actually engaged in the working of the mine. (*Ibid.*, sec. 2562 to 2571).

NEBRASKA

Constitutional Provisions

Uniformity. Taxes shall be uniform as to class and in proportion to value. (*Constitution*, Art. IX, sec. 1).

Statutory Provisions

Property tax. Real estate shall include all mines, minerals,

quarries, mineral rights, mineral springs, and wells, and all privileges pertaining thereto. (*Revised Statutes*, 1903, sec. 10400). Property of companies and mines shall be listed and taxed where located. (*Ibid.*, sec. 10403).

NEVADA

Constitutional Provisions

Uniformity. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims. (Constitution, Art. X, sec. 1).

Mines and mining claims. Mines and mining claims, not patented, shall be taxed upon the proceeds alone. When patented, each mine shall be assessed at not less than five hundred dollars except when one hundred dollars in labor has been actually performed on such patented mine during the year, in addition to the tax upon net proceeds. (*Ibid.*, Art. X, sec. 1).

Statutory Provisions

Assessment of patented mines. The term "patented mine" as used in the Nevada act means "each separate, whole or fractional patented mining location whether such whole or fractional mining location be covered by an independent patent or be included under a single patent with other mining locations". (*Laws of Nevada*, 1915, chap. 206, sec. 1). Each patented mine shall be assessed at not less than five hundred dollars, except where one hundred dollars in labor has been actually performed upon such patented mine during the calendar year for which assessment is levied, in addition to the tax on the net proceeds (*Ibid.*, sec. 2). The county assessor shall assess each patented mine in his county at not less than five hundred dollars. (*Ibid.*, sec. 3).

The owner of two or more contiguous patented mines may perform all the work required by Article X of the constitution upon one mine only; provided, the aggregate amount of such work shall be equal to one hundred dollars for each of such contiguous patented mines. (*Ibid.*, sec. 9).

Net proceeds and surface improvements. Surface improvements and net proceeds are taxed at the same rate as property in general, payable quarterly. (*Revised Laws*, sec. 3622, 3687). The Tax Commission ascertains the proceeds by deducting from

the gross yield only such actual costs of extraction from the mine, of milling and concentrating, of transportation, reduction, and sale as shall be deemed by said commission to be just, proper and reasonable, and not introduced to deprive or defraud the State of any portion of its just revenue. In any suit at law arising under the provisions of this section, the burden of proof shall be upon the owner of such mine to establish that any item of cost disallowed by the commission is nevertheless just, reasonable and proper and not entered to defraud the State. (*Laws of Nevada*, 1915, chap. 153, sec. 13).

NEW HAMPSHIRE

Constitutional Provisions

Uniformity. The general court shall have power to levy proportional and reasonable assessments, rates, and taxes upon all persons and estates within its limits. (Part 2, Art. 5).

Statutory Provisions

Property tax. Real estate shall be taxed independently of any mines or ores contained therein until such mines or ores shall become a source of profit. (*Public Statutes*, 1901, Title IX, chap. 55, sec. 4).

When mines, ore, or rights therein are owned by a person other than the one to whom the real estate belongs, they are taxed separately as real estate. (*Ibid.*, Title IX, chap. 58, sec. 2).

Corporation. Stock in corporations in the State shall be taxed except where the property represented by the stock is taxable directly to the corporation. (*Ibid.*, Title IX, chap. 55, sec. 7).

Stock in corporations located out of the State, owned by persons living in the State, shall be taxed except where either the stock or the property represented by it is taxed in the towns or states where the corporations are located. (*Ibid.*, Title IX, chap. 55, sec. 7).

NEW JERSEY

Constitutional Provisions

Uniformity. Property shall be assessed for taxes under general laws and by uniform rules, according to its true value. (Constitution, Art. IV, sec. 7).

Statutory Provisions

Property tax. All property not exempt shall be taxable at its true value. (*Compiled Statutes of New Jersey*, 1910, IV, 5076).

All property shall be valued by assessors of the respective taxing districts. (*Ibid.*, p. 5076).

Franchise tax. All corporations pay annually a graduated license fee or franchise tax on the amounts of capital stock issued and outstanding. This does not apply to mining companies having at least fifty percent of their capital invested in the State. (*Laws of New Jersey*, 1906, chap. 19).

NEW MEXICO

Constitutional Provisions

Uniformity. Taxes upon tangible property shall be in proportion to the value thereof and taxes shall be equal and uniform upon subjects of taxation of the same class. (Constitution, Art. VIII, sec. 1).

Statutory Provisions

Mining claims. No tax shall be assessed, levied or collected upon any mining claim, located under the mining laws of the United States, nor upon any shaft or workings therein, until after patent shall have been duly issued therefor by the United States, and for one year thereafter; but nothing herein contained shall be held or construed to exempt from taxation, as provided by law, the improvements upon any such mining claim, other than the shafts and other workings as aforesaid, nor the net product of any such mining claim. (*New Mexico Statutes*, chap. CVII, sec. 1).

Valuation. It shall be the duty of the county assessor to fix the valuation of all property (listed for taxation) at one-third of the actual cash value thereof in accordance with the standards of valuation of the different classes of property as fixed by the county commissioners. (*Ibid.*, sec. 11).

Classification. For the purpose of taxation all mines, mining claims or mineral lands held for mining purposes situated in New Mexico shall be divided into two classes, as follows:

1. Productive mines and mineral lands.
2. Non-productive mines and mineral lands.

Productive mines and mineral lands shall be such as are mined in good faith for the mineral values thereof, with a fair degree of continuity throughout the year for which the same are assessed and on a scale reasonably commensurate with the opportunity and difficulty of disposing of the product thereof. All other mines, mining claims and mineral lands shall be assessed as non-productive. (*Laws of New Mexico*, 1915, chap. LV, sec. 1).

Net proceeds. Every person, corporation or association of persons, engaged in the actual mining of gold, silver, copper coal, lead, or other valuable mineral deposit concerning the operation of each mine or group of mines worked by such person, corporation, or association during the year next preceding and giving a statement of the product from such mines or mineral lands. This shall "include a true and correct statement and account of the actual expenditures of money and labor in extracting such ore or mineral from the mine or mineral lands and of transporting the same to the mill or other treatment or reduction or refining works, the cost of preparation, treatment, reduction, refining and handling of the same and conversion thereof into money or its equivalent" and any other information which may be required by the State Tax Commission and which would be of benefit or advantage to such Commission in ascertaining the net value of such production. (*Ibid.*, sec. 2).

"The State Tax Commission must from such statement or such other information as it can procure determine the net value in dollars of the output of each of such mines during the previous year. The amount of such valuation shall be taken and considered and assessed as in lieu of the assessable value of the mineral in such mine, mining claim or claims, or mineral land from which, or any portion of which, such mineral shall have been extracted; and such net value of said mineral so extracted shall be taxed at the same rate as other properties are taxed in the county, and other subdivision in which such mine is situated, and the taxes levied therein shall be considered as taxes upon such mineral values in said lands. By the 'net value' of mineral output, as such term is herein used, is meant the difference between the actual cost of production, transportation, treatment, shipment and sale of same, including coke, made from coal, and the amount realized, if sold, or which could be realized at the time of making such report by the sale of the same, not to be less, however, in either event, than the true market value thereof." (*Ibid.*, sec. 4).

Improvements. "Nothing contained in this act must be construed to exempt from taxation any improvements, buildings, erections, structures, or machinery placed upon any mine or mining claim, or used in connection therewith or used in the transportation, reduction or refining of the product thereof, or to exempt from taxation any value which any mining claim or mineral lands may have for other than mining purposes, but all such buildings, erections, structures and machinery and all grazing, building and other surface values of said mining claims or mineral lands shall be assessed and taxed in the same manner as other property of like kind." (*Ibid.*, sec. 7).

Non-productive patented mining claims. "All non-productive patented mining claims and other non-productive mineral lands known to contain valuable deposits of coal, ores or other minerals, in commercially workable quantities, shall be assessed and taxed upon the reasonable valuation thereof as undeveloped mineral lands in addition to their surface value for grazing, agriculture, timber, or other purposes. In fixing such valuation, it shall be the duty of the taxing officials to take into consideration the transportation facilities, distance from railroads, and opportunity for marketing the product of such mining claims or mineral lands." (*Ibid.*, sec. 8).

Mineral rights. "In cases where the minerals or mineral rights in the land belong to owners other than the owners of the land and such ownership is shown by deeds duly recorded in the office of the county recorder of the county in which such land is situated, such minerals or mineral rights shall be assessed separately against the owners thereof and the taxes thereon shall not be a lien upon the land; and the taxes upon such land shall not be a lien upon such separately owned mineral or mineral rights." (*Ibid.*, sec. 8).

Mine accounts. "In order that all such facts so required to be contained in such statement may be accurately determined and verified, it shall be the duty of such person or corporation to keep and preserve at the mining place, or principal office, thereof in this state accurate and permanent accounts showing in detail all and singular the various items of expense entering into the costs of production, transportation, treatment, milling, refining and sales, and also the amounts realized from the sale of all and any portion of such mineral and the product thereof and the State Tax Commission shall have power to prescribe the method of keeping such accounts." (*Ibid.*, sec. 2).

In making the statement of expenditures mentioned in the preceding section there shall not be included therein any amounts expended for machinery, or other improvements, or appliances for such mining operations or for improvements made for the purposes of reducing or refining such mineral, or for the construction of mills or other reduction works, including coke ovens, and washeries or improvements made for transporting of such mineral, but all expenditures made for any and all such improvements, structures, buildings or other facilities shall be considered as part of the capital account of such mining operations and as no part of the operating expense thereof. Such expenditures shall not include the salaries, or any portion thereof, of any person, or officer, not actually engaged in the working of such mine, or in the reduction, transportation, sale or refinement of such mineral, or personally superintending the management thereof. (*Ibid.*, sec. 3).

Corporations. The owner or holder of stock in any firm or corporation shall not be assessed individually for the stock, if the entire capital or property represented by the stock has been taxed. (*New Mexico Statutes*, chap. CVII, sec. 14).

NEW YORK

Constitutional Provisions

Nothing specific on mines.

Statutory Provisions

Property tax. Real estate includes land, improvements, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the State. (*Laws of New York*, 1909, chap. 62, sec. 3). All real property within the State, and all personal property situated or owned within the State, is taxable, unless exempt from taxation by law. (*Ibid.*, sec. 3).

Personal property of mines is taxable locally. (*Ibid.*, chap. 62, sec. 5).

Capital-stock tax.—The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll or shall be exempt by law, together with the surplus profits or reserve funds exceeding ten percent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value. (*Ibid.*, sec. 12).

Domestic mining companies having more than forty percent of their capital stock invested in the State are exempt from the capital-stock tax. The rate of this tax varies according to net assets, market price of the stock, and dividends paid. (*Ibid.*, chap. 62, sec. 182 and 183).

Franchise tax. Domestic mining companies having more than forty percent of their capital stock invested in the State are exempt from the capital-stock tax. The rate of this tax varies according to net assets, market price of the stock, and dividends paid. (*Ibid.*, chap. 62, sec. 182 and 183).

NORTH CAROLINA

Constitutional Provisions

Uniformity. Taxation shall be by uniform rule of all real and personal property according to its true value in money. (Constitution, Art. V, sec. 3).

Income tax. The legislature may tax incomes, but not both property and income. (*Ibid.*, Art. V, sec. 3).

Statutory Provisions

Assessing. Real property shall be valued according to its true value in money, considering the mines, minerals, quarries or other valuable deposits known to be available therein and their value. (*Revised Statutes*, sec. 5203). Real property includes land, improvements and all rights and privileges and all estates therein. (*Laws of North Carolina*, 1903, chap. 251). Mineral rights severed from the surface shall be assessable to the owner of the mineral rights. (*Ibid.*, 1913, chap. 203, sec. 32).

Capital stock. Every mining corporation shall pay to the state treasurer annually a tax upon each one hundred dollars of the actual value of its whole capital stock. (*Revised Statutes*, 1905, sec. 5108). As applied to domestic corporations, the tax is based on issued and outstanding capital stock, and as applied to foreign corporations it is based on the proportion of capital stock represented by property owned and used and business transacted in the State.

NORTH DAKOTA

Constitutional Provisions

Uniformity. Taxes shall be uniform upon the same class of property. (Constitution, sec. 176).

Assessing. All taxable property, except as hereinafter in this section provided, shall be assessed in the county, city, township, village, or district in which it is situated, in the manner prescribed by law. The property, including franchises of all companies or corporations operating in this state and used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the State Board of Equalization in a manner prescribed by such State Board as may be provided by law. (*Ibid.*, sec. 179).

Statutory Provisions

Uniformity. All property in the State shall be subject to taxation. (*Revised Code*, 1905, sec. 1481).

Property tax. All property shall be assessed at its full value in money. (*Ibid.*, sec. 1512). Real property includes lands, improvements, and all mines, minerals, and quarries in and under the same and all rights and privileges appertaining thereto. (*Ibid.*, sec. 1482).

Assessors shall assess each division of lignite coal and minerals (separate mineral right) in the county in which it actually lies when the ownership is severed from that of the surface, whether the minerals are known to exist or not. (*Laws of North Dakota*, 1911, chap. 297).

OHIO

Constitutional Provisions

Uniformity. All property shall be taxed according to a uniform rule at its true cash value. (Constitution, Art. XII, sec. 2).

Corporation. Corporate property shall forever be taxed like the property of individuals. (*Ibid.*, Art. XII, sec. 4).

Mines. Laws may be passed providing for the imposition of taxes upon the production of coal, oil, gas, and other minerals. (*Ibid.*, Art. XII, sec. 10).

Statutory Provisions

Property tax. All property shall be subject to taxation. (*General Code*, 1910, sec. 5328).

Real property includes not only land, but all improvements and all rights. (*Ibid.*, sec. 5322). Property shall be assessed at its true value in money. Mineral rights, separately owned from the surface, shall be assessed and taxed independently of the surface and against the owner of the rights. (*Ibid.*, sec.

5560-5563). If the value of any petroleum, oil, and natural gas wells, coal and ore mines, limestone quarries, fire-clay pits, or works of any kind designed for the production of mineral of any kind increases or diminishes in value \$100 from the valuation in the quadrennial assessment, the assessor may make corrections annually when he lists personal property. (*Ibid.*, sec. 5562).

Capital-stock tax. All corporations, except public utility companies and certain financial companies, pay to the State for state purposes a tax of three-twentieths of one percent on the par value of outstanding stock of domestic corporations and on the proportion of the authorized capital stock of foreign corporations represented by property owned and used in business transacted in Ohio. (*Ibid.*, sec. 5381-5386).

OKLAHOMA

Constitutional Provisions

Uniformity. Taxation shall be uniform on the same class of subjects. (Constitution, Art. X, sec. 5).

Assessing. All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. (*Ibid.*, Art. X, sec. 8). Nothing in the Constitution shall be construed to prevent taxation of different classes of property by different means or methods. (*Ibid.*, Art. X, sec. 22).

Specific taxes. The legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, income and graduated income taxes; also production or other specific taxes. (*Ibid.*, Art. X, sec. 12).

Statutory Provisions

Property tax. All property shall be subject to taxation. (*Oklahoma Statutes*, 1910, sec. 7302). Real property shall be construed to mean the land itself and all buildings, structures, and improvements and all rights and privileges thereto appertaining, and all mines, minerals and quarries on or under the same. (*Ibid.*, sec. 7304). Oil and gas property shall be listed. (*Ibid.*, sec. 7332).

Upon persons holding more than 640 acres of taxable land there is levied a graduated land tax in addition to the ad valorem tax charged against all property. The rate is graduated from one-fourth percent of the value of land in excess of 640

acres when the person holds not to exceed 1280 acres, to 10 percent upon the excess over 10,000 acres and not exceeding 25,000 acres of average taxable value. The average taxable value is taken as twenty dollars. Three hundred twenty acres shall be exempt from the tax regardless of the value of the land. (*Ibid.*, sec. 7525). A similar graduated tax is levied upon leaseholders. When a person holds by lease more than 640 acres and not to exceed 1280 acres a tax of one percent per annum is levied on the income, rents, and profits of the excess over 640 acres. The rate is increased according to the acreage held, up to ten percent upon the income from the excess over 5000 acres and not exceeding 10,000 acres. (*Ibid.*, sec. 7526).

Gross output tax. Every person, firm, association, or corporation engaged in the mining or production within the state of asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper or of petroleum or of other crude oil or other mineral or of natural gas, shall file quarterly with the state auditor a statement under oath showing the gross amount of mineral, oil, or gas produced, the cash value at the place of production, the amount of royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law; and shall at the same time pay to the State Auditor a tax equal to one-half of one percent of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver, copper produced, less the royalty interest, and equal to three percent of the gross value of production of oil or gas, less the royalty interest. The owner of the royalty interest shall pay the tax upon the royalty interest. (*Laws of Oklahoma, 1916, House Bill No. 1, amending Oklahoma Revenue Laws, sec. 7464*).

The payment of the taxes specified shall be in full and in lieu of all taxes by the State, counties, cities, towns, and townships, school districts, and other municipalities upon any property rights attached to or inherent in the minerals, upon leases for the mining of asphalt, and ores bearing lead, zinc, jack, gold, silver, or copper or for petroleum or other crude oil or other mineral oil or for natural gas, upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing oil or natural gas, or any mine producing the aforesaid minerals and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt, or ores bearing minerals hereinbefore mentioned

during the tax year in which the same is produced and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore mentioned; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing any of the minerals named, mined, produced, and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time. (*Ibid.*, sec. 7464, as amended).

The gross production tax is levied and collected for the following specific purposes:

(1) For current expenses of State Government, two-thirds.

(2) For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).

(3) For and in aid of the construction of permanent roads or bridges in the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).

License tax. Domestic corporations pay a license fee of 50 cents per \$1000 of capital stock, and foreign corporations \$1 per \$1000 capital stock employed in the State. This does not apply to companies paying the gross receipts tax. (*Revised Laws*, 1910, sec. 7539).

OREGON

Constitutional Provisions

Uniformity. There shall be a uniform rate of assessment and taxation. All property shall be taxed at its just value. (Constitution, Art. IX, sec. 1).

Statutory Provisions

Property tax. All real property and all personal property shall be subject to assessment and taxation in equal proportion. (*General Laws of Oregon*, 1909, sec. 3551). Real estate includes the land itself, improvements, all rights and privileges, and all mines, minerals, quarries, fossils, in, under, or upon the land. (*Ibid.*, sec. 3552). Personalty includes improvements by persons on lands claimed by them under the laws of the United States. (*Ibid.*, sec. 3553).

Corporation license fee. Domestic mining companies having an output in excess of one thousand dollars pay annually a fee ranging from \$10 on \$5000 capital to \$200 if the capital

stock exceeds \$2,000,000. If the output is less than \$1000, they pay \$10 per annum as a license. (*Laws of Oregon*, 1913, chap. 73).

PENNSYLVANIA

Constitutional Provisions

Uniformity. All taxes shall be uniform on the same class of subjects. (Constitution, Art. IX, sec. 1, par. 153).

Statutory Provisions

Property tax. Companies pay locally a property tax. (*Pennsylvania Laws*, 1844, 486).

Anthracite tax. Every ton (2240 pounds) of anthracite mined shall be subject to a tax of two and one-half percent of the value when prepared for the market, which tax shall be assessed at the time when the coal has been mined and is ready for shipment or market.¹ The officer in charge of the mine shall assess the product daily as shipped and upon the first day of the month shall report under oath the assessed value of the shipment for the preceding month and a total for the year on January first. The officer shall receive one percent of the tax collected as compensation for the services imposed on him. If the officer fails or refuses to assess the product as required by law, the tax is increased by ten percent and the officer is subject to a fine of \$500 or one year imprisonment or both. Fifty percent of the proceeds of the tax is paid to the fund for the State Highways of the Commonwealth, and fifty percent to the cities, boroughs, and townships where the coal is mined. (*Laws of Pennsylvania*, 1915, Act 331).

Capital stock. Corporations pay an annual tax of 5 mills on each dollar of the actual value of its capital stock. (*Purdon's Digest of Pennsylvania Laws*, p. 6065, sec. 18).

Loans. A deduction of 4 mills on every dollar of the face value of bonds or certificates of indebtedness is made by the treasurer of corporations when paying interest to bondholders. This deduction is to be paid to the state treasurer. (*Laws of Pennsylvania*, 1885, P. L. 194; Act of June 8, 1891, P. L. 229).

¹After the law of 1915 was enacted the courts declared the law of 1913 to be unconstitutional. No taxes have as yet (1916) been paid under the law of 1915 and the Deputy Attorney General writes (October 20, 1916): "Whether settlements will be made under the Act of 1915 and that question re-heard I am not able to advise now."

RHODE ISLAND

Constitutional Provisions

Uniformity. All laws should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among the citizens. (Art. I, sec. 2).

Assessment. The General Assembly shall, from time to time, provide for making new valuations of property for the assessment of taxes in such manner as they deem best. (Art. IV, sec. 15).

Statutory Provisions

Property tax. All property shall be subject to taxation. (*General Laws*, 1909, chap. 56, sec. 1).

All property shall be assessed at its full and fair cash value. (*Ibid.*, chap. 58, sec. 3).

SOUTH CAROLINA

Constitutional Provisions

Uniformity. Taxation shall be uniform on all property, except mines and mining claims, the proceeds of which alone shall be taxed. (Constitution, Art. X, sec. 1).

Statutory Provisions

Property tax. All real and personal property shall be taxable except as noted. (*Code of South Carolina*, 1912, Title III, chap. XIV, sec. 287).

All personal property used in connection with mines and mining claims and all land not actually mined connected with mines and mining claims shall be assessed for taxation and taxed as is done in the case of all other personal and real estate. (*Ibid.*, sec. 304).

Mining rights. When the fee of the soil in any tract or lot of land is in one person, and the right to any minerals therein or structures thereon in another, the proceeds of the minerals and the structures shall be valued and taxed as personal property, to the owners thereof, respectively. (*Ibid.*, sec. 380).

Gross proceeds. In all cases where land is actually mined, such land shall not be assessed for taxation or taxed, but in lieu thereof, the gross proceeds alone of such mines and mining claims shall be assessed and taxed. Such gross proceeds shall be determined by the cash market value of the material mined. (*Ibid.*, sec. 304).

Corporation license. Corporations shall pay a tax of one-half mill upon each dollar of capital stock. (*Ibid.*, sec. 364).

SOUTH DAKOTA

Constitutional Provisions

Uniformity. All taxes shall be uniform on all property. (Constitution, Art. XI, sec. 2).

Statutory Provisions

Property tax. All real and personal property shall be subject to taxation. (*Compiled Laws*, 1913, sec. 2053). Real property shall include all lands, improvements, and all rights and privileges thereto belonging, and all mines, minerals and quarries in and under the same. (*Ibid.*, sec. 2054). All property shall be assessed at its true value in money. (*Ibid.*, sec. 2085). In valuing any real property upon which there is a coal or other mine, or stone or other quarry, the same shall be valued at such a price as such property including the mine or quarry, would sell at a fair voluntary sale for cash. (*Ibid.*, sec. 2085).

TENNESSEE

Constitutional Provisions

Uniformity. All property, real and personal, shall be taxed according to its value so that taxes shall be equal and uniform throughout the State. No one species of property shall be taxed higher than any other species of the same value. (Constitution, Art. II, sec. 28). The legislature may tax incomes derived from stocks and bonds not taxed ad valorem. (*Ibid.*, sec. 28).

Statutory Provisions

Property tax. All property shall be assessed at actual cash value. (*Laws of Tennessee*, 1907, chap. 602, sec. 4). All mineral interests shall be taxed as real estate. (*Ibid.*, sec. 5). Machinery shall be taxed as personal property. (*Ibid.*, sec. 8).

Annual-charter tax. Every domestic corporation and every foreign corporation qualified to transact business in the state, shall be required to pay annually to the State for state purposes a tax in the nature of an annual-charter fee ranging from \$5 to \$150 according to the amount of authorized capital stock. (*Ibid.*, chap. 434, as amended by *Laws of 1913*, first extra session, chap. 13).

Corporation tax. All corporations shall pay an ad valorem tax upon the full value of corporate property,—not less than the actual value of all shares of stock, together with the actual value of the bonded indebtedness. (*Ibid.*, 1907, chap. 602, sec. 22). Deductions shall be made for property outside the state.

TEXAS

Constitutional Provisions

Uniformity. Taxation shall be equal and uniform. All property shall be taxed in proportion to its value which shall be ascertained as provided by law. (Constitution, Art. VIII, sec. 1). The legislature shall have no power to release from taxation. (*Ibid.*, sec. 10).

Income tax. The legislature may tax incomes of both natural persons and corporations. (*Ibid.*, sec. 1).

Statutory Provisions

Property tax. All property shall be subject to taxation and valued at its true and full value in money. (*Statutes*, 1911, Art. 7503, 7530).

Real property includes the land itself and all buildings, structures, and improvements thereon, all rights and privileges belonging thereto, and all mines, minerals, quarries, and fossils in and under the same. (*Ibid.*, Art. 7504).

Taxable personal property includes royalties. (*Ibid.*, Art. 7505).

Property held under a lease or a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, shall be considered for all the purposes of taxation, as the property of the person so holding the same. (*Ibid.*, Art. 7529). In valuing any real property in which there is a coal or other mine, or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would probably sell at a fair voluntary sale for cash. (*Ibid.*, Art. 7530).

Corporation tax. Individuals and corporations operating oil wells shall make a quarterly report showing the total amount of oil produced during the quarter and the average market value thereof. They shall pay to the state treasurer an occupation tax for the quarter equal to one-half percent of the total amount of all oil produced at the average market value. (*Ibid.*, Art. 7383).

Franchise tax. Domestic corporations shall pay fifty cents on each one thousand dollars of authorized capital stock, unless the amount of stock issued plus the surplus and undivided profits shall exceed its authorized capital stock; in that event said corporations shall pay fifty cents on each thousand dollars of outstanding stock plus the surplus and undivided profits. The minimum tax shall be ten dollars. The rate shall be twenty-five cents per thousand dollars when the capital stock or the capital stock and surplus and profits exceed one million dollars. (*Ibid.*, Art. 7393). Foreign corporations pay a similar tax but graduated. (*Ibid.*, Art. 7394).

UTAH

Constitutional Provisions

Mines. All mines and mining claims, containing valuable mineral deposits after purchase from the United States, shall be taxed at the price paid the United States therefor, unless the land is used for other purposes. If used for other purposes, it shall be taxed as is property similarly used. Machinery used in mining and all property and surface improvements having a value separate and independent of such mines and the net annual proceeds shall be appraised and taxed by the State Board of Equalization. (Constitution, Art. XIII, sec. 4).

Statutory Provisions

Property. Real estate includes all mines, minerals and quarries in and under the land and all rights and privileges appertaining thereto. (*Statutes*, 1907, sec. 2505). Surface improvements having a separate value from the mine or claim not to be exempt from taxation. (*Ibid.*, sec. 2572). Capital stock and franchises shall be listed and taxed where the principal office or place of business is located. (*Ibid.*, sec. 2530).

Net proceeds tax. All mines report annually the net proceeds which are taxed at the same rate as other property. From the gross yield, including coke made from coal, or bullion or matter made from ore not taxed, deductions shall be made for the actual expenditures in mining, transporting, and reducing the product, including expenditures for labor, machinery, supplies used, improvements and transportation; but money invested prior to the period covered by the annual report shall not be included nor the salaries of officers not actually engaged in the state in the operations. The balance shall constitute the net proceeds. (*Ibid.*, sec. 2566).

Annual corporation license tax. All domestic corporations and all foreign corporations hereafter engaged in any business in this state shall procure a certificate from the Secretary of State, authorizing such corporation to engage in business within this state and each of the corporations shall pay to the Secretary of State a corporation license tax as follows: All corporations with an authorized capital stock of \$10,000 or less, \$5; with an authorized capital stock of more than \$10,000 and not to exceed \$25,000, \$10; and graduated to \$250 on an authorized capital stock of more than \$4,000,000. (*Laws of Utah*, 1915, chap. 42).

VERMONT

Constitutional Provisions

Nothing specific on mines.

Statutory Provisions

Property tax. Real and personal property shall be taxable. (*Public Statutes*, 1906, sec. 488).

Property shall be appraised quadrennially after 1910. (*Ibid.*, sec. 525). Forges, furnaces, mines, and quarries where stone is quarried shall be set in a column separate from real estate and designated as first-class real estate. All other real estate shall be designated as second-class real estate. (*Ibid.*, sec. 525). The interest of a grantee in severance from surface ownership, in mines, quarries, or the right of mining and quarrying shall be set in the list as real estate. (*Ibid.*, sec. 491).

Exemption. Municipalities may exempt from taxation for ten years quarries, mines, and such equipment as is necessary for the prosecution of the business and all capital and personal property used in such business, if the amount invested exceeds one thousand dollars. (*Ibid.*, sec. 499).

VIRGINIA

Constitutional Provisions

Uniformity. All property, except as provided, shall be taxed. All taxes shall be uniform upon the same class of subjects. (Constitution, Art. XIII, sec. 168).

Assessing. Property shall be assessed at a fair market value to be ascertained as prescribed by law. Nothing in this Constitution shall prevent the General Assembly, after the first day of January, 1913, from segregating for the purposes of taxation the several kinds and classes of property, so as to specify and

determine upon what subjects state taxes and upon what subjects local taxes may be levied. (*Ibid.*, sec. 169). Real estate shall be reassessed every five years. (*Ibid.*, sec. 171). The General Assembly shall provide for the special and separate assessment of all coal and other mineral land; but until such special assessment is made, such land shall be assessed under existing laws. (*Ibid.*, sec. 172).

Income tax. The General Assembly may levy income taxes. (*Ibid.*, sec. 170).

Corporation tax. The State shall have the right to tax corporations. (*Ibid.*, sec. 64).

Statutory Provisions

Property tax. All real estate, except as exempted, shall be subject to an annual tax. (*Code of Virginia*, 1904, sec. 456). Machinery and fixtures to real estate in mining establishments shall be assessed and taxed against the owner thereof. (*Ibid.*, sec. 485). In assessing real estate, the actual value of the minerals shall be considered; if the title to the minerals is separate from the title to the surface, it shall be assessed and taxed to the owner. (*Laws of Virginia*, 1910, sec. 437a).

Capital-stock tax. A graduated state franchise tax is collected; the amount varies from \$10 on \$25,000 capitalization to \$200 on \$1,000,000 and \$10 for each \$100,000 in excess thereof. (*Ibid.*, 1910, chap. 58). This tax is levied on domestic corporations only.

Registration fee. An annual tax or registration fee is paid by all corporations, foreign and domestic. The tax is graduated and based on total authorized capital stock. It ranges from \$5, on a capitalization of \$15,000, or less, to \$25, when in excess of \$300,000. (*Ibid.*, 1908, chap. 227).

WASHINGTON

Constitutional Provisions

Uniformity. All property shall be taxed in proportion to its value. (Constitution, Art. VII, sec. 1). The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property according to its value in money. (*Ibid.*, sec. 2). The legislature may provide for the taxation of corporations. (*Ibid.*, sec. 3).

Exemptions. The legislature may by general law provide for the exemption of property other than that listed in the Constitution. (*Ibid.*, sec. 2).

Statutory Provisions

Property tax. All property shall be assessed at its true value in money. In valuing any real property in which there is a coal or other mine, or stone or other quarry, the same shall be valued at such a price as such property including the mine or quarry would sell at a fair, voluntary sale for cash. Taxable leasehold estate shall be valued at such a price as it would sell at a fair, voluntary sale for cash. (*Code of Washington*, sec. 9112). All property shall be assessed at not to exceed fifty percent of its true and fair value. (*Laws of Washington*, 1913, chap. 140).

License. An annual license fee of \$15 is levied upon companies having capital stock. (*Code*, sec. 3714).

WEST VIRGINIA

Constitutional Provisions

Uniformity. Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. The legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations. (Constitution, Art. X, sec. 1).

Statutory Provisions

Property tax. Personal property includes the value of mine or manufactured products. (*Code of West Virginia*, 1906, sec. 794).

Leaseholds. Mineral rights owned separately from the surface shall be assessed and taxed to their owner. (*Ibid.*, sec. 923). As the minerals are exhausted, if the actual decrease in value is in excess of one hundred dollars, the assessor shall make such reduction in value as shall be proper and if development increases the value more than one hundred dollars, the assessor shall increase the assessment to the actual value thereof. (*Ibid.*, sec. 923).

Capital-stock tax. Domestic corporations pay, in addition to the general property tax, an annual state license based on authorized capital stock. Those corporations having the principal place of business and chief works in the State pay a tax varying from \$10, when the authorized capital stock is \$5000 or less, to \$170, when the authorized capital stock is \$1,000,000, with \$60 additional tax for each \$1,000,000 additional capital

stock. (*Ibid.*, 1909, chap. 68). When the principal place of business or chief works is located without the State, the tax varies from \$15 on a capitalization of \$10,000 or less, to \$675 when the authorized capital stock is more than \$4,000,000, with \$50 additional tax on each \$1,000,000 authorized capital stock in excess of \$4,000,000. (*Code of West Virginia*, sec. 1050). Foreign corporations pay a tax based on the proportion of the capital stock represented by its property owned or used in the State, the minimum tax being \$100. The rates are graduated. (*Ibid.*, sec. 1052).

WISCONSIN

Constitutional Provisions

Uniformity. Taxation shall be uniform. (Constitution, Art. VIII, sec. 1).

Income tax. Taxes may be imposed on incomes, which taxes may be graduated, and progressive. (*Ibid.*, Art. VIII, sec. 1).

Statutory Provisions

Property tax. All property, unless specially provided for, shall be assessed locally. (*Statutes of Wisconsin*, 1911, sec. 1034). Real estate shall include all lands, improvements, rights, etc. (*Ibid.*, sec. 1035). Real property shall be valued by the assessor from actual view or from the best information that the assessor can practically obtain, at the full value which could ordinarily be obtained therefor at private sale. (*Ibid.*, sec. 1052). Mineral rights and reservations held by other than the owner of the surface shall be taxable. (*Ibid.*, sec. 1042j). The assessor in determining the value of land shall consider minerals, quarries, and other valuable deposits known to be available therein and their value. "But the fact that the extent and value of minerals and other valuable deposits are unascertained shall not preclude the assessor from affixing to such parcel of land, the value that would ordinarily be obtained therefor at private sale." (*Ibid.*, sec. 1052).

Lead and zinc mines and lands. "For purposes of assessment and taxation lands containing deposits of lead or zinc shall be valued in the following manner, to wit: The value of each parcel of such land, exclusive of its mineral content, shall first be determined, and to this there shall be added, in lieu of the value of such mineral content, one-fifth of the gross amount of sales of any ore, mineral or deposit extracted from

such land at any time and sold during the preceding calendar year. Nothing herein shall be construed to exempt from taxation the buildings, machinery, mills, equipment, stores, supplies or other personal property of any person, copartnership, corporation, association or company engaged in mining or extracting such deposits." (*Laws of Wisconsin*, 1915, chap. 388, sec. 1. To be numbered sec. 1053 of the Statutes). "Every owner of such land, and every person, copartnership, corporation, association or company engaged in mining or extracting such deposits shall furnish to the assessor of incomes of the district a verified statement or return giving a correct description of each such parcel of land, the name of the owner thereof, the amount of sales or purchases of all ore, minerals and deposits mined or extracted therefrom at any time and sold during the preceding calendar year. In the discretion of the assessor of incomes, similar reports may be required from each person, copartnership, association, corporation or company engaged in purchasing such ore, minerals or deposits." (*Ibid.*, sec. 2). "The assessor of incomes shall determine the gross amount of sales of such ore, mineral, or deposits from each parcel of land and shall certify the same to the assessor of each district. On the basis of such sales the valuation of each such parcel of land shall be computed by the assessor and shall be taxed as other property in the same district is taxed." (*Ibid.*, sec. 3).

Income tax. The State income tax is levied upon corporations and upon individuals. (*Laws of Wisconsin*, 1911, chap. 658. *Ibid.*, 1913, chap. 27, 443, 487, 554, 615, 720. See also *Wisconsin Income Tax Law*, 2d Ed., Wis. Tax Commission, Madison, 1913).

The rate upon the income of corporations is 2 percent on the first \$1000 of taxable income, and there is a graduation of the rate up to 6 percent on all taxable income in excess of \$7000. (*Laws of Wisconsin*, 1913, chap. 720).

The rate upon the taxable incomes of individuals is graduated from 1 percent on the first \$1000 to 6 percent on the excess over \$12,000.

The term income includes "all royalties from mines or the possession or use of franchises or legalized privileges of any kind". (*Ibid.*, sec. 1087m-2).

In determining taxable income, rentals, royalties, and gains or profits from the operation of any mine, or quarry shall follow the situs of the property from which derived. (*Ibid.*, chap. 720, sec. 1087m-2).

Deductions allowed a corporation include "ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property, including a reasonable allowance for depreciation by use, wear, and tear of property from which the income is derived and in the case of mines and quarries an allowance for depletion of ores and other natural deposits on the basis of their actual original cost in cash or the equivalent in cash." (*Ibid.*, chap. 720, sec. 1087m-3).

WYOMING

Constitutional Provisions

Uniformity. All taxation shall be equal and uniform. (Constitution, Art. I, sec. 28). All property, except as provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property. (*Ibid.*, Art. XV, sec. 11).

Exemptions. The legislature may by general laws provide for the exemption of property other than that listed in the Constitution. (*Ibid.*, Art. XV, sec. 12).

Mines. All mines and mining claims shall be taxed on surface improvements and, in lieu of taxes on land, also on the gross product, provided that the product of all mines shall be taxed in proportion to the value thereof. (*Ibid.*, Art. XV, sec. 3). All coal lands in the State from which coal is not being mined shall be listed for assessment, valued for taxation and assessed according to value. (*Ibid.*, Art. XV, sec. 2).

Statutory Provisions

Property tax. All property not exempted is subject to taxation in manner directed. (*Compiled Statutes*, 1910, sec. 2324).

Gross product tax. In addition to the taxes on surface improvements and in lieu of taxes upon the land on which the claims are being worked, there shall be levied and collected a tax on gross product of all mines, oil-wells, and quarries. (*Laws of Wyoming*, 1909, sec. 2449). The Commissioner of Taxation shall appraise the value of the gross products of all mines, and submit such appraisements to the State Board of Equalization. (*Ibid.*, chap. 66).

CHAPTER V

METHODS OF TAXING MINES AND MINERAL LANDS IN THE STATES

SUMMARY

An examination of the laws of the various states shows that taxes have been levied on mining property, as follows:

- A. A general property tax.
- B. A tax on the gross output or gross earnings, in addition to a property tax on improvements and, in some states, on land.
- C. A tax on net earnings, in addition to a property tax on improvements and, in some states, on land.
- D. A tax on some percentage of the gross and of the net earnings in addition to a tax on improvements and, in some states, on land.

In addition to one of the foregoing, there may be:

- E. A corporation tax, including a license or business tax.
- F. A state income tax.

Several states have previously used a tax which is not at present employed anywhere in the United States, namely,

- G. A tonnage tax.

GENERAL PROPERTY TAX

With the exception of South Carolina in the South; Oklahoma in the Middle West; and Colorado, Wyoming, Montana, Idaho, Utah, Nevada, and New Mexico in the West, all of the states now levy the general property tax on mining property the same as on other property.¹

As applied to mines the general property tax possesses the same advantages and disadvantages that prevail in its application to property in general, and in addition it may be said that the task of making a fair appraisal is more difficult for

¹In addition to the general property tax Pennsylvania has levied a tax upon anthracite mines. Oklahoma does not tax coal mines upon the gross proceeds but upon an ad valorem basis, while Wisconsin taxes all mines upon an ad valorem basis except those producing lead and zinc which are valued and assessed at one-fifth of the gross proceeds for the preceding year.

mines than for most other types of property. This is due to the fact that a technical knowledge of mines and mining operations is necessary on the part of the appraiser, if a proper valuation is to be made.²

The constitutions of most of the states have prescribed such limitations regarding taxation that the property tax as now employed is practically the only method which can be used in taxing mines, and it seems that the best plan of procedure in such states is to enact laws providing for the assessment of all property at full cash value, with competently trained and experienced mine appraisers to determine the value of mining property.

At the present time, with the exception of Minnesota, Michigan,³ Wisconsin, Arizona, Virginia, West Virginia, and Ohio, all the important mining states assessing mines under the general property tax, rely upon the work of local assessors. In those states in which the appraisal of mining property has been centralized or supervised by state officers there has been secured apparently a valuation of property which is generally recognized as being more equitable than is possible under the system of local and unsupervised assessment.

In 1913 the states taxing mines under the general property tax produced 82.66 percent of the total output of the mineral industry. In 1915, Arizona joined the list of state taxing mines under the general property tax and if Arizona had been included in the list of general property tax states in 1913, the percentage would have been increased from 82.66 to 85.56.⁵ From these data it is apparent that, at the present time at least, one of the greatest public problems to be solved in the mining states is that of valuation of mines, for the purpose of taxation under the general property tax.

A graduated tax may be levied upon land in order to discourage the holding of large estates or large tracts for speculative purposes. The graduated land tax in Oklahoma^{5a} has

²The appraisal of mines is considered in Chapter VII.

³For iron mines only.

⁵If the value of the coal output of Colorado, taxed under the general property tax, is included with the value of the output of the general property tax states, the percentage becomes 86.50.

^{5a}*Oklahoma Statutes*, 1910, sec. 7325, 7326.

^{5b}The mining law of Mexico which took effect July 1, 1916, calls for a general increase in taxation on all large properties with a corresponding

been noted in Chapter IV. In Mexico,^{5b} in Canada, and in Australia^{5c} this method of taxation is employed extensively.

GROSS OUTPUT AND PROPERTY TAX

In several states the gross value of the entire output of mines is entered upon the tax roll of the district and the mine is taxed on the value of its output at the same rate as is applied to property in general. This is in effect a declaration that the value of a mine is equivalent to the value of the product for one year. In addition, mines pay a property tax upon improvements. This plan is followed by Wyoming and South Carolina for all mines and, in a modified way, by Wisconsin and Oklahoma for certain types of mines.

Wyoming. A tax is levied on improvements upon mines in Wyoming⁶ and, in lieu of taxes upon the land, while the property is being worked, there is also a tax upon the gross product. This applies to all mines, oil-wells, and quarries.⁷

South Carolina. The Constitution of South Carolina provides that only the proceeds of mines shall be taxed.⁸ However, the statutes provide for the taxation of the personal property used in connection with mines and mining claims.⁹ When land is actually mined it is exempt from taxation¹⁰ and the proceeds are assessed at the cash market value and taxed at the same rate as other property.

Wisconsin. The lead and zinc mines and lands are valued for assessment at one-fifth of the gross amount of sales of ore

benefit for the small operators, the announced intention of the government being to break up holdings that are conserved more for speculative than for development purposes. The unit of taxation is the pertenencia, or mining claim, of one hectare or $2\frac{1}{2}$ acres. The assessment on gold and silver mines is \$6 yearly on from 1 to 10 claims; 11 to 50 claims, \$12 each yearly; from 51 to 100 claims, \$18 per claim yearly; on 101 claims and upward, \$24 each yearly.

^{5c}Sleeman, H. R. Taxation in Australia. *Mining Magazine*, 1915, XIII, 92-96.

⁶*Laws of Wyoming*, 1909, sec. 2449.

⁷The assessment of all mines is based upon the gross output, allowance being made for operating expenses and also the valuation of the output at the mine, as regards distance from market, or railroads, quality of coal, etc. The State is districted and the same valuation placed upon the product of each district separately." Correspondence.

⁸Constitutions, Art. X, sec. 1.

⁹*Code of South Carolina*, 1912, Title III, chap. XIV, sec. 304.

¹⁰*Ibid.*, par. 304.

extracted from the mines or lands during the preceding calendar year. On this valuation the property is taxed at the same rate as other property in the district.¹¹ This valuation covers only the mineral content of the land and all buildings and surface improvements are taxed ad valorem.

Oklahoma. A variation from the preceding method has been used by Oklahoma. In this State in addition to the ad valorem tax on property, all mining and oil companies pay a tax on the actual cash value of the output, except coal mines which are taxed as other property.¹²

This is actually a gross earnings or gross output tax, the South Carolina and Wyoming method being practically a general property tax levied upon the value of the mine which is taken arbitrarily as the value of one year's output. The rate of the tax in Oklahoma is the same from year to year while in South Carolina and Wyoming the rate paid by mines depends on the levy upon all property.

Pennsylvania. In 1913 the Pennsylvania legislature enacted a law providing for a tax at the rate of two and one-half per cent of the value at the mine of every ton of anthracite when prepared for market.¹³ This follows the Oklahoma method in that the rate is fixed. However, the Pennsylvania tax is in addition to the property taxes which have been levied previously. The so-called "anthracite tax" is a state tax, but one-half of the proceeds of the tax is returned to the county.

A tax on output at a uniform rate throughout the State reduces mining practically to a leasing system. Title to the mine rests in the operator instead of the State as may be the case in the leasing system. In both instances the State receives a percentage of the value of the output.

The general objection made to this method of taxation is that usually no discrimination is made between mines producing at a high cost and those operating at low costs.¹⁴

NET EARNINGS AND PROPERTY TAX

Several of the Rocky Mountain states employ a tax upon

¹¹*Laws of Wisconsin*, 1915, chap. 388.

¹²*Laws of Oklahoma*, 1916, House Bill No. 1.

¹³*Laws of Pennsylvania*, 1913, Act 374. Amended by Laws of 1915, chap. 331. The law of 1913 was declared unconstitutional in 1915. See Chapter IV for the anthracite tax law of 1915.

¹⁴*Infra*, chapter VI.

both the net earnings and the improvements of productive mines. The net earnings tax was first used in order to encourage the development of mining property. It exempted unprofitable mines and attempted to place the tax burden according to ability. Instead of levying upon the net earnings of mines at a fixed or a graduated rate, all of the states now using this method of taxation tax net earnings at the same rate as other property, thus practically appraising each mine at its net earnings for one year.

The great difficulty in the use of this system is in the determination of the net earnings. The statutes of most of the states employing this method of taxation specify what deductions may be made from gross earnings in order to determine the net.

This system is now used in Idaho, Montana, Nevada, New Mexico, and Utah. Colorado uses a modified form of the system.

Idaho. Idaho taxes all mining claims purchased from the United States at the price paid the United States therefor, unless the surface, or some part of it, is used for purposes other than mining, in which event the land is taxed as is other land similarly used.¹⁵ All machinery and improvements on mines and mining claims are taxed as is other property.¹⁶ In addition to these property taxes, all mines pay a tax upon net profits. To determine the base for the net profits tax, deductions are made from the gross receipts as follows:

The actual expenditure for mining operations, for milling, concentrating, or reducing the ore, for transportation of the ore to the treatment plant, and for repairs, and improvements necessary to the plant used in all these operations. No deductions are allowed for the money invested in the mine, nor for the salaries of officers not immediately and consecutively employed in the working or management of the mine.¹⁷

Montana. Similarly, Montana taxes mining claims,¹⁸ improvements¹⁹ and the net proceeds.²⁰

Nevada. Nevada taxes surface improvements, net proceeds, and patented mining claims on which less than one hundred

¹⁵*Code of Idaho*, sec. 1863.

¹⁶*Ibid.*, sec. 1863.

¹⁷*Laws of Idaho*, 1909, sec. 1864.

¹⁸Const., Art. XIII, sec. 3.

¹⁹*Revised Code of Montana*, sec. 2570.

²⁰*Ibid.*, sec. 2563 to 2571.

dollars' worth of work has been done during the year, such a claim being assessed at five hundred dollars. The same rate is applied to net proceeds as to property in general.²¹

New Mexico. Mines and mining claims are taxed both upon surface improvements and the net product.²²

Utah. Utah appraises mining claims at the price paid for them to the government. Taxes are levied upon patented claims, all property and surface improvements,²³ and the net proceeds at the same rate applied to other property.²⁴

GROSS AND NET EARNINGS TAX WITH THE GENERAL PROPERTY TAX

The method of taxing a mine upon the gross earnings does not discriminate between profitable and unprofitable mines, nor between developing mines with a small output produced at a loss and developed properties. No distinction is made between two mines of equal output but operating under different conditions. On the other hand the system of taxing mines upon net earnings does not reach the unprofitable mine which may have some cash value and under the system of valuing mines at their net earnings for one year the rate applied to other property might not take from mines a fair share of the public revenue required.

By a combination of some percentage of the gross earnings with some percentage of the net earnings it has been thought that greater justice may be secured. This plan was used in 1913 and 1914 by Arizona and in a modified way is employed in Colorado.

Colorado. The law of Colorado divides mining property, except mines of coal, iron, asphaltum and quarries, into producing and non-producing. Mines having a gross annual output of less than five thousand dollars are classed as non-producing and all others are producing.²⁵ Producing metal mines are taxed upon a sum equal to one-fourth the gross proceeds or all the net proceeds as defined in the law in case the net exceeds one-fourth of the gross.²⁶ The net proceeds are determined by deducting from the gross value of the product, the actual cost

²¹*Laws of Nevada*, 1913, chap. 33 and 134.

²²*New Mexico Statutes*, chap. CVII, sec. 1.

²³*Compiled Laws*, sec. 2304 and 2572, as amended by Laws of 1909, chap. 63.

²⁴*Revised Statutes*, 1907, sec. 2566 to 2569.

²⁵*Colorado Revised Statutes*, 1908, sec. 5618.

²⁶*Laws of Colorado*, 1915, chap. 138.

of mining, of transporting the product to the place of reduction or sale, and the actual cost of treatment, reduction or sale. Salaries of officers not actually and consecutively engaged may not be included.²⁷ The surface improvements of all mines are taxable as is other property.²⁸ Producing mines of coal, iron, asphaltum and quarries are assessed in the same manner as other property.²⁹

Arizona. In 1913 Arizona adopted a new plan for appraising mines under the general property tax. This plan was void after June 30, 1915, and as the legislature of 1915 failed to provide any special laws for the taxation of the mines, the mines hereafter will be taxed under the laws applying to property in general. While the act of 1913³⁰ specified that this method of taxation, adopted only for the time, was not to be considered as a method of taxing proceeds, yet the law in its wording, and in its operation apparently, was in no important detail different from the taxes on proceeds employed by the other states. All mines were taxed upon improvements. Mines were divided into two classes,—producing and non-producing. A producing mine was defined by the law as one which yielded net proceeds over and above the expenses enumerated in the law.³¹ All other mines were classed as non-producing and were taxed as other real estate. In addition to the taxes on improvements, producing mines paid a tax, at the same rate as property in general, upon the value of the mine which value was fixed arbitrarily by the law at four times the net proceeds plus one-eighth of the gross proceeds.³² The net proceeds were determined by deducting from the gross the actual expenses of operation and treatment including charges for repairs and betterment, and for transportation. It was specified that such expenses should not include money invested in the purchase price of the mine, in real estate, or in the construction of new mills or reduction works, nor the salaries or any portion of them of any persons not actually and consecutively engaged in working or managing the mine.³³

²⁷*Ibid.*, chap. 138.

²⁸*Revised Statutes*, 1908, sec. 5621.

²⁹*Ibid.*, sec. 5625.

³⁰*Revised Statutes*, 1913, sec. 4994.

³¹*Ibid.*, sec. 4980.

³²*Ibid.*, sec. 4982.

³³*Ibid.*, sec. 4982.

There was great dissatisfaction on the part of many of the tax payers of Arizona during the time this law was in force.

TONNAGE TAX

Mines may be taxed upon the tonnage basis, that is, there may be a fixed or graduated tax upon every ton of mineral product mined. When there is a flat rate there is no distinction in regard to the quantity, market price, or net value of the tonnage produced.

The tonnage tax was not employed by any state in 1915.³⁴ A tonnage tax was levied in Michigan from 1853 to 1891. The rate applied was fixed by the legislature and was changed from time to time as the finances of the State required and as the physical condition of the mines and the financial condition of the mining industry warranted. The tax was primarily a state tax and no attempt was made at graduation. That portion of the law which discriminated between ore smelted in the State and that shipped out of the State for treatment was declared unconstitutional in 1875, as being in restraint of interstate commerce.³⁵ Since the law has been repealed, there has been almost continually a demand for the enactment of a tonnage tax law. The State Constitution permits specific taxes but although the representatives of the mining districts constitute a minority of the State Legislature, tonnage tax bills have failed of enactment. In 1914 a movement was started to force legislative action by the "initiative" but when the facts concerning mine taxation in Michigan became generally known in the agricultural districts of the State, the movement lost force and in 1915 there was practically no support in the State Legislature for the tonnage tax measures.

In Minnesota a tonnage tax was employed from 1881 to 1897. In 1896 the law was declared unconstitutional and it was repealed by the Legislature in 1897. There was subsequently an effort to restore a tonnage tax system as the appraisal of mines by the local assessors was impractical. Since the appraisal of mines has been made under the supervision of the Tax Com-

³⁴Florida collects a graduated license tax from phosphate plants. The graduation is upon the basis of tonnage as follows: Plants of not more than 20 tons daily capacity, \$10 tax; 20 to 30 tons, \$15 tax; 35 to 50 tons, \$25 tax; 50 to 65 tons, \$40 tax; more than 65 tons capacity, \$75 tax. *Laws of Florida*, chap. 5597, sec. 8.

³⁵*Jackson Mining Co. v. Auditor General*, 32 Mich. 488, (1875).

mission there has been little sentiment in favor of a tonnage tax. It is recognized generally that in order to secure justice in Minnesota a tonnage tax should be graduated. In order to secure facts upon which such graduation might be based and then to apply this graduated rate would require as much labor and skill in appraisal as the system now in use.

Both Maryland and Pennsylvania formerly employed a tonnage tax on mineral products which tax was collected through the railroad carriers. The Pennsylvania Act of 1864 levying a tax of two cents on the product of mines, quarries, and claybeds was declared unconstitutional in 1872.³⁶ The Maryland law was held unconstitutional in 1874.³⁷

In 1873 a special road tax was levied by townships in Pennsylvania at the rate of one and one-half cents per ton of ore hauled by teams.³⁸ The Pennsylvania franchise tax upon corporations was a tonnage tax and was in force from April 24, 1874 to July 1, 1881.³⁹

CORPORATION TAXES

Corporations may be taxed in three ways. "The first consists in subjecting corporations to the general property tax only, the second in imposing special taxes in addition to the general property tax, and the third in taxing selected classes of corporations by special methods solely for state purposes."⁴⁰

In summarizing the bases of corporation taxes Professor Seligman enumerates: (1) Value of the property; (2) cost of the property; (3) capital stock at par value; (4) capital stock at market value; (5) capital stock plus bonded debt at market value; (6) capital stock plus total debt, both funded and floating; (7) bonded debt or loans; (8) business transacted; (9) gross earnings; (10) dividends; (11) capital stock according to dividends; (12) net earnings; and (13) franchise.⁴¹

Other than the special methods of taxing all mines, no special method of taxation has been enacted applying to mining corporations as distinguished from other types of corporations. In certain states employing license taxes, licenses may be

³⁶15 Wall. 232.

³⁷40 Md. 22.

³⁸73 Pa. 370.

³⁹*Supra*, p. 67.

⁴⁰*Taxation of Corporations*, Part V, p. 4, Report of U. S. Commissioner of Corporations, 1914.

⁴¹Seligman, *Essays in Taxation*, 8th Ed., p. 218.

required of mines or mining plants, as in Florida⁴² and Louisiana.⁴³

Many of the large mining companies are incorporated in states which do not rank among the important mineral producing states and are subject to taxation under the laws of the state in which they are incorporated as well as under the laws of the state in which they are operating.⁴⁴

STATE INCOME TAX

A state income tax is authorized by legislative enactment in Mississippi, North Carolina, Oklahoma, South Carolina, Virginia, and Wisconsin. In addition to the states noted taxation of income is permitted by the constitution of Arizona, California, New Mexico, Ohio, and Utah, but none of them is now taxing incomes.

Under the general property tax, Massachusetts taxes incomes in excess of \$2,000 derived from property not taxed. With the exception of Wisconsin, the taxes levied upon incomes are apparently directed at individuals, but the Wisconsin tax is levied upon corporations as well as individuals, firms and co-partnerships. The Wisconsin law⁴⁵ was enacted in 1911 and amended in 1913.

The rate levied upon the income of corporations is graduated as follows:

Two percent on the first \$1000 of taxable income or any part thereof, two percent on the second \$1000 or part, and increasing by one-half percent on each \$1000, to a maximum of six percent on all taxable income in excess of \$7,000.⁴⁶

The term "income" is defined to include "all royalties derived from mines",⁴⁷ and it is specified that "taxable income, rentals, royalties and gains or profit from the operation of a mine or quarry shall follow the situs of the property from which derived, and income from personal service and from land con-

⁴²*Laws of Florida*, chap. 5597, sec. 8.

⁴³*Laws of Louisiana*, 1912, Act. 209, sec. 1 and 2.

⁴⁴See Reports I to VI on *Taxation of Corporations* and *Special Report on Taxation*, 1913, United States Bureau of Corporations. See also *Taxation and Revenue Systems of State and Local Governments*, Bureau of Census, 1914.

⁴⁵*Laws of 1911*, chap. 658; *Laws of 1913*, chap. 27, 443, 487, 554, 615, and 720.

⁴⁶*Laws of 1913*, chap. 720, sec. 1087m-6.

⁴⁷*Ibid.*, sec. 1087-m-2.

tracts, mortgages, stocks, bonds, and securities shall follow the residence of the recipient."

In estimating the income from mines, a corporation is permitted to make deductions, "including a reasonable allowance for depreciation by use, wear, and tear of property from which income is derived and an allowance for depletion of ores and other natural deposits on the basis of their actual, original cost in cash or the equivalent of cash."⁴⁸ A similar deduction is permitted individuals owning mines. Depreciation is never allowed in excess of that actually recorded on the books of the corporation.

The dividends declared by a going corporation, including mining corporations, will be conclusively presumed for purposes of income taxation as against stockholders to be from net earnings or profits, so that it cannot be claimed, to avoid an income tax, that the dividends were really declared from the capital.^{48a}

Upon the rehearing in 1915, the foregoing ruling of the court was reaffirmed. Mr. Justice Barnes who dissented stated at length his concept of income and pointed out that dividends from mines are in a sense "gross income" if the word "income" may be applied at all. "The ore in the mine was a capital asset having a determinable tonnage value. Any profit made in the process of mining and marketing the ore was income. But the value of the ore in the mine was not income. The capital assets of the corporation were reduced to the extent of the value of that ore by taking it out. When the money received was distributed, the stockholders had money in lieu of an undivided interest in a quantity of iron ore equal in value to the money received." The change of one form of corporate assets into another is not in itself the production of income.^{48b}

A mining corporation, operating under a lease, was granted a deduction from its state income tax of \$16,173.58 for royalties paid but claimed that it was entitled to an additional deduction of \$65,000 for ore depletion during the year. The Supreme Court of Wisconsin held that a leasehold interest is not equivalent to ownership for purposes of income taxation and the deduction for royalties is the only deduction to which a mining lessee is entitled in respect to ore.^{48c}

⁴⁸*Ibid.*, sec. 1087-m-3.

^{48a}*Van Dyke v. City of Milwaukee*, 146 N. W. 812 (1914).

^{48b}150 N. W. 509, (1915).

^{48c}*Klar Piquett Mining Co. v. Town of Platteville*, 157 N. W. 763, (1916).

The state of Connecticut has inaugurated "an income tax on corporations based upon the report to the federal government. The rate is two per cent upon the net taxable amount reported to the federal government."⁴⁹

The proposed equated income tax is discussed in Chapter VI.

TAX ON ROYALTIES OR LEASES

The practice of taxing income, as for example mining "royalties", has not been common in the United States. With the enactment and enforcement of income tax laws, the federal government will secure revenue from this source. In various states the income from mining leases is noted by the assessor who determines what the market value of the leasehold is on the basis of the returns. The holder of the lease is then assessed at this estimate and taxed at the regular property tax rate. Usually by the terms of mining leases in the United States, it is specified that the property owner shall pay all taxes.⁵⁰

As previously noted⁵¹ the license tax in Louisiana was interpreted by the courts to be a tax on the business of mining and, if the royalty was deducted before the tax upon the operator was figured, the owner of the land or mining right could not be forced to pay a license tax on the royalty as he is not in the mining business.⁵²

The Minnesota Supreme Court has held recently that iron ore royalties accruing to resident fee owners of St. Louis County mines are not taxable under the classification of "moneys and credits." In the opinion of the court royalties are rents and unaccrued rents are real estate. They are taxed under the laws by the taxation of real estate and not as personal property. They should therefore not be listed and taxed as "credits." This reverses the decision of the district court.⁵³

⁴⁹Corbin, W. H. in *Proceedings of National Tax Association*, 1915, IX, 260.

⁵⁰In Great Britain it is customary to levy a tax upon royalties from mining properties. *Proceedings of National Tax Association*, 1908, II, 417.

⁵¹*Supra*, p. 50.

⁵²For additional data on royalties see pp. 20, 35, 72, 75, and 120.

⁵³*State v. Royal Mineral Association*, 156 N. W. 128, (1916).

CHAPTER VI

THE SYSTEMS OF MINE TAXATION COMPARED

The various systems of mine taxation previously enumerated differ essentially in respect to the base upon which the rate is levied. In most of the states the same rate that is applied to all property, assessed under the general property tax, is applied to the value of mining property, to the value of output of the mine, or to the net proceeds of mines.¹ With a more or less uniform rate, it is, therefore, important to consider whether the base is a true measure of ability.

In the following section the principal points that will be discussed are: (a) Methods of determining the base and the rate; (b) the certainty and stability of public revenue from mines under the several systems; (c) the amount of the taxes paid during the life of a mine under the several systems; (d) the effect of taxation upon the method and the rate of development of mines; and (e) the systems as applied to unproductive mining property.

General property tax. Under the general property tax, mines are usually valued upon the same theory that other property is valued, namely, that ability to pay taxes is measured by the value of the property owned. The base that is determined by assessment and equalization is supposed to bear the proper ratio to other assessed values, whether the property be a mine, a house, or a farm, and all of these assessments are based on present value. Assuming it is intended that the burden of taxation shall be distributed upon all property in proportion to its present value and that all property will be valued upon the same basis and taxed at the same rate, the general property tax presents no greater evils when applied to mines than when applied to other property. The principal difficulty has been in the appraising of mines for taxation. Owing to the fact that the value of a mine changes from day to day as the quantity and the quality of the "ore in sight" change with the advance

¹The details of methods of appraisal will be considered later. *Infra* p. 153.

of the working faces and the removal of mineral, mine appraisal involves problems not found in the assessing of real estate of the ordinary type. These problems, however, are the same ones that mining engineers must deal with in determining the purchase price or the sale price of mining property. The changing conditions in many mines may require frequent inspection by the appraiser and the expense entailed may be entirely out of proportion to the public revenue derived. This difficulty of determining, without too great expense, a base which will result in justice to all taxpayers has been one of the most serious objections to the general property tax as applied to the taxation of mines.

Some of the state laws prescribe how property shall be assessed and the method by which the assessor shall arrive at an approved valuation. As an illustration, the laws of Pennsylvania prescribe that the assessors shall assess, rate, and value every subject of taxation according to the actual value thereof and at such rates and prices as the same would bring at a bona-fide sale after due notice.² Other states have similar enactments. Owing to the fact that sales of mines are not frequent it has become necessary for assessors to employ methods of mine valuation that have been used under other and somewhat different circumstances. In the anthracite fields of Pennsylvania the following methods have been proposed:

1. Valuation based upon sales.
2. Valuation based on foot-acres of coal remaining in the ground.
3. Valuation based on royalty rates.
4. Valuation based on capitalized estimated profits.³

According to the decisions of the Supreme Court of Pennsylvania, the sales-method is the only strictly legal one, but prices of coal lands have such a wide range owing to the location of the land, quality of the coal, etc., that the other methods enumerated have been used extensively by the assessors. The foot-acre method involves determining the total thickness of coal per acre remaining unmined. However, as it is practically impossible to determine the thickness and quality of coal in advance of working, the Supreme Court of Pennsylvania has declared

²*Laws of Pennsylvania, 1841, Act 139.*

³Norris, R. V. Taxation of coal lands. *Proceedings American Mining Congress, 1913, XVI, 331.*

that the foot-acre method is not a "proper measure" of the value of coal lands for the purpose of taxation.⁴

On the royalty basis the estimated tonnage of coal would be valued at the current royalty rate. To this practice the Supreme Court of Pennsylvania has objected in the following language: "Market value is its fair selling value for cash, not payable as royalty strung out through a long series of years, but payable at the time or as soon thereafter as the value could be determined. Such a method does not make allowance in undeveloped territory for the length of time coal may lay in the ground unmined, undeveloped, and unprofitable. It is impossible to reduce to a scientific basis and to mathematical precision the elements of value entering into the present selling price of a tract of coal land. The question is not what earning power coal lands may develop in the future, but what they are actually worth in the market at present."⁵

The method of capitalizing earnings has not been used in Pennsylvania. This method of valuation of property has been in use many years and has been emphasized in connection with mining by Mr. H. C. Hoover. "The cardinal principle of Hoover's system of valuation is simply that the value of a mine is a capitalization of future profits. Given the margin of profit in an ore, the amount of ore, and the time required to get the profit, the value is merely that profit as it will appear in a series of dividends discounted from the future date of payment."⁶

⁴229 Pa. 465, (1911).

⁵229 Pa. 470, (1911).

⁶Finlay, J. R. Valuation of Iron Mines. *Transactions American Institute of Mining Engineers*, 1913, XLV, 282. In order that the relation of taxes to the exhaustion of mines may be presented as forcibly as possible, a few of the most modern ideas of mining economics are introduced as notes at this point.

A mine has been defined as 'a limited deposit of valuable ore, and that to make the greatest profit from it requires that the deposit be worked out rapidly.' (Hoover, H. C. *Principles of Mining*, 142, New York, 1909.

"The main factor in this proposal is the time value of money; not only the money tied up in the investment, but of the money to be returned by the investment. It follows that the true interest of a mine owner is not to perpetuate an income, but to complete a job; not to prolong the life of his mine, but to shorten it by exhausting all profitable ore and getting the money into something else as soon as possible. Good economy, by Hoover's theory, demands that the ore reserves be ruthlessly slashed

The principle of capitalization of earnings assumes a definite output and definite earnings from a developed tonnage in the mine. It involves practically the same investigation as is required in the physical valuation of a mine. The physical valuation of a mine requires more than a listing of lands, buildings, equipment and tonnage and quality of material in reserve. It necessitates estimating the life of the property and the average annual earnings from the available data on the cost of production and the average price to be obtained for the product. The capitalization of these average annual earnings at an assumed rate of interest will give the present value of the mine.⁷

Both the method of physical valuation and that of capitalizing the earnings involve estimating the amount that shall be set aside for depreciation of the mine and of the equipment. These systems are well adapted to mines in which the total available tonnage of mineral may be known years in advance,—or completely when the mine is opened,—by drilling and by sampling. If no extensions of the mineral deposits are developed and no new deposits are opened, the value of the mine will decrease annually as the mineral is removed. A system of physical valuation or of capitalization of earnings allows properly for the depletion of the mineral reserves of the mine.

Assume that a particular mine, valuable for a deposit whose extent has been determined, is subject to taxation under the general property tax. During the first year the sum paid in taxes would be the largest in the history of the mine if the tax rate is maintained uniformly, for as the ore in the mine is worked out the tax burden on the mine would become lighter each succeeding year because the assessed value would be less. In order to raise annually the same amount by taxation, assuming that the value of other property remains constant, it would

by getting out the best ore first, in preference to poorer ore, there being no logical reason why any profit should be sacrificed in order to make a showing of stability." (Finlay, J. R. Mine valuation. *Engineering and Mining Journal*, 1912, XCIII, 1238).

Stability of income during a period of years has been, however, one of the ambitions of many enterprising and conservative mine operators. The fact remains nevertheless that the exhaustion of mines proceeds rapidly and inevitably, and the community in which mines are located must recognize the fact, that public revenue from mines may continue during a comparatively short period of time.

⁷Steele, H. Mine taxation, *Engineering and Mining Journal*, 1914, XCVII, 381.

be necessary to increase the rate on all property or, by equalization, to appraise all property higher. The continued decline in the value of the mine would thus gradually shift the tax burden upon other property until finally the mine would pay no taxes whatever.

If the finances of the property be managed judiciously the assets of the company, including the present value of the mine and of the sinking fund, will be practically and continually constant. The taxes paid upon the physical valuation of the mine may grow less from year to year as the mine is being worked out, but if the entire assets of the company are subject to taxation at the site of the mine, the total sum paid in taxes by the mining company may be maintained practically constant during the life of the mine. This latter condition however seldom prevails as the funds set aside for the redemption of the capital invested are frequently deposited or reinvested outside of the mining district and are subject to taxation where they are deposited or invested. Generally, then, it may be assumed that a mine with known mineral resources, operating with an uniform annual output, will pay a constantly decreasing sum for taxes if taxed under the general property tax and appraised upon a physical basis.

The taxes paid under the general property tax by a mine whose annual output, earnings, and life can be estimated approximately may be represented as a diminishing annuity through the period of production or life of the mine.⁸

Instead of the methods of valuation or assessment previously noted, the base may be determined by state law as some multiple or fraction (1) of the gross value of the output, or (2) of the gross earnings after certain specified deductions have been made, or (3) of the net earnings. Upon the base determined in this manner, the same rate may be applied as is levied on other property. In order to determine the suitability of each type of base, it will be well to consider whether justice will be secured among mines operating upon various kinds of mineral deposits as well as among different mines operating upon the same type of deposit.

⁸In comparing the tax burden of mines under the several systems it will be necessary to assume certain more or less theoretical conditions in order that the results under the several systems may be demonstrated. In each case the real measure of the public revenue from mines should be taken to be either the present valuation or the amount of all the taxes paid during the life of the mine.

If all mines produced minerals of the same net value per ton, the system of appraising upon the market value of the output would not work inequality among the mines; but it places upon the same basis gold mines, copper mines, iron mines, oil wells, etc., whose product annually may be of equal market value but whose earning power may differ widely. Similarly, a gold mine producing a large tonnage of low value and requiring a large capital investment, may be earning annually but a small profit while the gross value of the product may be the same as that of the product of a high grade mine with small investment. The assumption that ability may be measured justly by a tax on the gross value of output is entirely unwarranted. Table No. I is based upon statistics from the 13th Census, Volume XI, and shows the gross and the net value of the output of coal, precious metal, copper, iron, and lead mines and oil and gas wells of the United States for the year 1909.

TABLE NO. I.

STATISTICS OF MINES, SHOWING RATIO BETWEEN SURPLUS AND GROSS VALUE OF PRODUCT.

Product	Gross value	Expenses of operation	Surplus above expense of operation	Surplus in percent of gross value
Coal, anthracite.....	\$149,180,471	\$139,324,467	\$ 9,865,004	6.6
Coal, bituminous.....	427,962,464	395,907,026	32,055,438	7.49
Iron.....	106,947,082	74,071,830	32,875,252	30.74
Copper.....	134,616,987	107,679,312	26,937,675	20.01
Precious metals, deep mines.....	83,885,928	68,764,692	15,121,236	18.03
placers.....	10,237,252	6,810,482	3,426,770	33.47
Lead and zinc.....	31,363,094	24,453,299	6,909,795	22.03
Petroleum and natural gas.....	185,416,684	135,638,644	49,778,040	26.85

While the present value can not be estimated from the annual net earnings alone, yet an inspection of the table of gross value of output, operating expenses, and surplus above operating expenses shows that among the various divisions of the mineral industry there is a wide range in the ratio between gross value of product and surplus above operating expenses.

In the anthracite industry the surplus is 6.61 percent of the value of the gross output; in the bituminous coal, 7.49 percent; in the deep precious metal mines, 18.03 percent; in the copper, 20.01 percent; in the lead and zinc, 22.03 percent; in petroleum and natural gas wells, 26.85 percent; in iron mines, 30.74 percent; and in gold placers, 33.47 percent.

The iron mines of the United States produced ore which sold for about one-fourth as much as the bituminous coal mined, yet the surplus above operating expenses of the iron mines was practically the same as that of the bituminous coal mines. The operating expenses of the anthracite mines and of the oil and gas wells were practically the same, but the oil and gas wells had a surplus five times as great as the coal mines.

It would apparently be unfair to declare without further investigation that the value of the output of a mine should be taken as the true present value of the mine and be entered upon the tax rolls together with ordinary real estate and personal property which have been valued upon a sales basis. The present value of a mine is determined not by gross output but by net earnings throughout the life of the mine.

Between individual mines, as has been noted, there may be a great difference in operating costs. Two adjacent mines may produce the same volume of product of the same quality but the operating costs of the one may be much higher than those of the other. If the life of both mines is the same the present value of the one mine may greatly exceed the other on account of the difference in operating costs. There will thus be injustice in appraising mines simply at or in proportion to the value of the output.

The foregoing statements apply to producing mines. If a mine is not producing it would not be appraised at all on the output or on the earnings basis. A productive but non-profitable mine would be taxed on the basis of output but would be exempt if the basis is either net earnings or capitalized net earnings.

Non-productive mining property would be taxed only under the plan of physical valuation or appraisal upon the sales method. It has been claimed by some writers that the method of mine appraisal and the system of taxation may influence materially the method and rate of the development of the mine.⁹

⁹Zander, C. M. in *Proceedings of National Tax Association*, 1913, VII, 387.

This has been discussed particularly in connection with the general property tax when mines are valued upon a physical basis. The objection raised is that systematic development of the mine may open up large reserves of mineral which will not be removed from the ground for many years owing to the system of mining and the existence of sufficient developed mineral to maintain the current rate of production. If these new reserves are not mined for many years they may have but little present value. Their location may not warrant opening a new mine and they may be of little value to another operator owing to the cost of the separate shafts and the equipment which separate ownership would necessitate. If the mines and the mineral deposits are appraised on a scientific basis proper allowance is usually made for such contingencies. In a number of states, however, it has been held that such tonnage should be appraised upon the basis of average sales of mineral of equal quality.¹⁰

The essential value to the appraiser of information regarding developed mineral reserves is that it gives him a reliable basis for estimating the life of the mine. It has been held by some engineers that a mine may have too much ore developed if proper charges for the cost of development are made against each ton. Mr. Finlay has well emphasized the relatively greater importance of a small difference in the market price per unit of the product than of a difference of a few years in the life of a mine, assuming of course that the mineral deposit is of sufficient extent and value to return the capital investment. This applies to every kind of a mine except a gold mine. He cites an important mine earning over a million dollars a year, with an assured life of ten years and a possible life of twenty years. "If it lasts twenty years this mine will be worth, say \$12,000,000; if it lasts only ten years it will be worth \$7,500,000. If, however, the price of its ore falls eleven percent it will only be worth \$7,500,000 if it lasts the full twenty years. If, on the other hand the price of ore rises eleven percent, it will be worth well over \$10,000,000 with ten years life. This difference in price is no more than two men might readily disagree about; for instance, it is a difference about equal to that between 13.5 and 15 cent copper."¹¹

¹⁰Details regarding the classification of various grades of mineral reserves will be presented in Chapter VII.

¹¹Finlay, J. R. Mine Valuation. *Engineering and Mining Journal*, 1912, XCIII, 1238.

This same idea regarding the real future value of the mineral reserves has been forcefully emphasized by Mr. Norris in discussing the problems of valuation in the Pennsylvania anthracite fields.¹² Assuming that a company owns five tracts of coal land, each containing 2,000,000 tons of coal, to be worked, one tract at a time in sequence and at the rate of 100,000 tons per year, and assuming that this entire tonnage is appraised on the basis of the present royalty rate, each tract will have an assessed value of \$400,000 and will pay approximately eight thousand dollars annually in taxes. On a six percent basis the present value of each of the five tracts has been calculated and will be as follows:

	Start mining in year	Complete the min- ing in	Present value of royalties	Less pres- ent value of taxes	Net present value
First.....	0	20	\$344,100	\$ 58,880	\$285,220
Second.....	20	40	107,360	110,120	-2,760
Third.....	40	60	33,550	126,100	-92,550
Fourth.....	60	80	10,430	131,080	-120,650
Fifth.....	80	100	3,250	132,550	-129,300

According to these estimates the tract mined during the first twenty years will earn royalties having a present value of \$344,100. If the present value of the taxes, given as \$58,880, be deducted, the net present value is \$285,220. Estimates show by similar calculations that the present value of the royalties earned by the second tract is \$2,760 less than the present value of the taxes on this tract. The excess of the present value of the taxes over the present value of the royalties of the tract mined after the eightieth year is \$129,300.

The principal advantages claimed for the general property tax system as applied to mines are:

1. The public revenue secured in this manner does not vary much from year to year.

¹²Norris, R. V. Taxation of coal lands. *Proceedings American Mining Congress*, 1913, XVI, 331.

2. The cost of administration is not high for most types of mining property after an adequate system of appraisal has been established.

3. By adjusting the rate, considerable elasticity is possible.

4. All classes of mining property may be reached if the system is intelligently and forcibly administered.

5. The depreciation of mining property by the exhaustion of the mineral is properly recognized.

The most important disadvantages and objections raised against the system are:

1. The appraisal for taxation requires the services of technically trained men.

2. Certain types of property are difficult to appraise.

3. Certain assumptions must be made in many appraisals.

4. The expense of appraising certain types of property may be out of proportion to the value of the property and the revenue secured.

5. Mines in process of development and also unprofitable mines are taxed.

6. It may tend to hasten the mining of proven bodies of the best ore in order to shorten the period during which the ore is taxed.

7. It may restrain development.

Output taxes. It is assumed that by an output tax is meant a tax levied upon the gross value of the output at a rate different from the rate applied upon property appraised under the general property tax. Under this system the taxing district appropriates to itself a part of the gross income of a mine irrespective of the capital invested, of the operating expenses, of the net earnings, and of the life of the mine. Unless there is a graduated rate, each mine will pay taxes each year in proportion to the market value of the total product. It is evident that certain assumptions must be made by the officials who fix the rate that shall govern. This rate may be determined in several ways:

1. By requiring each industry to bear a certain proportion of the entire public expenses. In a certain state, for example, it is proposed that mining shall bear one-eighth of the tax burden. The apportioning of the tax burden among the industries and the interests of the State must be done more or less arbitrarily on the basis of capital invested, annual earnings, value of output, or some other basis upon which industries may be compared. Assuming that in some manner the amount to

be raised by taxing mines is known, and that the gross value of the annual output is known, the rate may be determined easily.

2. In the event that the tax burden has not been apportioned among the various industries, the tax rate may be fixed arbitrarily by law at a specified percentage of the gross value of the output. This procedure practically establishes a leasing system and differs from the system of taxing tonnage in principle in that the leasing rate or royalty is a percentage of the value of the output, rather than a specific amount per unit of quantity as is often the case in leasing.

3. Practically the only other method of determining the rate is by arbitrarily establishing a rate within the taxing district. This would be apt to cause inequality in the burden of taxation and the power to fix rates might be abused by local officials. As previously noted the output tax is not used extensively in the United States.¹³

Under the existing output tax, mines pay a specific percentage of the gross value of the output. In 1913, the Pennsylvania Legislature enacted a law providing for a tax of two and one-half percent upon the market value of each ton of anthracite. This tax is in addition to the general property tax.¹⁴ In South Carolina, mines are taxed upon the gross value of the output but at the same rate that property is taxed under the general property tax.¹⁵

If the output is maintained uniformly throughout the life of the mine, the tax would of course be uniform. All mines, having the same output in any year, would pay the same taxes irrespective of the capital invested, the net earnings, the life

¹³This method of taxation has been used extensively in Canada. Nova Scotia leases gold lands and collects two percent of the gross value of the output. In 1913 British Columbia levied two percent on all mineral products except coal. The gross value is the basis in this tax system. On producing mines yielding less than five thousand dollars a year there is granted a refund of half the tax, while placer mines yielding less than two thousand dollars are exempt entirely. Yukon Territory levied a tax of 2½ percent on all gold shipped out of the Territory. The provinces of Canada have preferred taxing gross rather than net proceeds, fearing that the books would be "doctored" if the taxes were figured on the net. The mining companies would object to the inquisitorial powers of the tax assessor.

Metal mines in Mexico are taxed on the value of the output.

¹⁴*Pennsylvania Laws*, 1913, Act. 374. As to constitutionality see p. 68.

¹⁵*Code of South Carolina*, 1912, Title III, chap. XIV, par. 304.

of the mine, or the present value of the mine. Assuming that the rate is uniform and that the output of the mine is fairly regular from year to year, the public revenue would be uniform.

The system of taxing output is favored principally for the following reasons:

1. It is not difficult to administer if the tax law is specific.
2. It is economical as no appraisal of mines is necessary.
3. It offers little chance for tax dodging as the amount and value of the output can be determined readily.
4. Mines are taxed when they are producing, and it therefore is a convenient system for the mine operator.
5. If the tax is graduated the burden upon the poorer mines may be reduced and that upon the more profitable mines may be adjusted accordingly.
6. Taxes are collected during the entire period of production in proportion to the output and irrespective of the approach of a period of unproductiveness. Only the present is considered.

The following objections have been raised:

1. The revenue secured by such a system is uncertain in amount and may vary much from year to year.
2. Generally there is no discrimination between mines as to ability, for the gross value or volume of the output is only occasionally a measure of the value of the mining property.
3. The future or life of a mine is not considered.
4. Unproductive mines or lands held for speculation are not taxed.
5. Productive mines that are unprofitable and mines being developed are taxed.

Tonnage tax. On the tonnage basis there is a levy of a specific charge against every ton or unit of mineral produced. Most of the state constitutions will not permit the collection of specific taxes. Michigan,¹⁶ Minnesota,¹⁷ Maryland,¹⁸ and Pennsylvania¹⁹ have used the system. A tonnage tax is levied upon the coal produced in Canada.²⁰ During recent years there has

¹⁶*Supra*, p. 52.

¹⁷*Supra*, p. 54.

¹⁸In Maryland this was a tonnage tax on coal carried by railroads. See *State v. Cumberland & P. R. Co.*, 40 Md. 22, (1874).

¹⁹*Supra*, p. 66-67.

²⁰Nova Scotia collects ten cents a ton on all of the coal produced except that of one company which contracted to pay twelve cents for a period of 99 years. British Columbia levies a tax of ten cents per ton

been an agitation in Michigan to impose a tonnage tax again instead of the general property tax.

A tax per unit of output is claimed by some to be a tax levied on the principle of ability. This would be true if all mines were producing at the same cost per unit of output, but this is never the case and the burden is greater upon the less profitable mines. The percentage of earnings per unit of product which goes into the taxes is therefore greater for the poorer mines than for the richer ones.

The determination of the rate, which makes the tax practically a royalty, is a problem which requires careful attention. In order to determine this rate, either there must be some effort to equalize the burden of taxation on mines as compared with other property, or the rate must be set arbitrarily at some figure which meets the general approval of the tax payers and of the voters of the district. Where the tonnage tax is used in Canada it is practically a royalty and approximates the royalty rate and no other taxes are paid by the mining companies on property used exclusively for mining purposes. In some provinces however the tonnage tax is levied in addition to the royalty paid to the Crown. In Michigan and Minnesota when the system was used the tonnage tax rate was much lower than the royalty rate. The title to the mineral lands is in individuals and corporations in Michigan and Minnesota, while in Canada the title to the mineral lands upon which the mines are operating is in the government.

In the accompanying table are shown the tonnage rates in Michigan and Minnesota when a tonnage tax was employed, and also the expenditure for taxes per unit of product under the general property tax.

<i>Michigan</i>	Tonnage tax	General prop- erty tax
Copper mines, per lb. copper in 1891.....	\$.000375	
Copper mines, per lb. copper in 1912.....		\$.003 to \$.006
Iron mines, per ton in 1891.....	.01	
Iron mines, per ton in 1909-1913.....		.1095

on coal and fifteen cents on coke, if produced from untaxed coal; previous to 1907 the rates were five and nine cents respectively. In Alberta and Saskatchewan there is a tax or royalty of five cents a ton on coal. (Morine, A. B. *Mining Laws of Canada*, chap. VIII. Toronto, 1909).

<i>Minnesota</i>	Tonnage tax	General prop- erty tax
Iron mines in 1896, per ton.....	\$.01	
Iron mines in 1914, per ton.....		\$.0566 ²¹
Iron mines in 1914, per ton.....		.23 ²²

It has been suggested that a graduated tonnage tax be employed. But the problem of graduating the rate would be in effect appraising the product as is now done in a number of states employing the general property tax.

The advantages claimed for the tonnage tax are briefly as follows:

1. Simplicity of administration and economy.
2. The taxpayers would know definitely in advance what taxes must be paid.
3. Only productive mines and mineral lands would be taxed.
4. The state would take a large share of the profits secured from mineral deposits.²³

It is urged that the system is not a good one because:

1. Volume of output is not often a measure of ability as mines producing a large tonnage may have the smallest profit per ton; conversely, mines having a small output may have a large profit per ton.
2. A fixed rate per ton may make mining unprofitable if the market price of the mineral product declines.
3. There is no tax upon non-producing mines and mineral lands held for speculative purposes.
4. The public revenue from such a tax is uncertain as it will vary directly with the tonnage, which may change from year to year.

Earnings tax. When a tax is levied on earnings it becomes necessary for the legislative body or for tax officials to determine what deductions from the value of the output shall be

²¹State taxes only.

²²Includes all taxes.

²³The Minnesota Tax Commission in 1908 recommended that a tonnage tax be employed instead of the general property tax. "Considerations of justice and sound fiscal policy make it desirable; in no other feasible way can the heritage and the diminishing value elements involved be recognized." (*First Biennial Report*, Minn. Tax Com., 1908, p. 224). By the "heritage element is meant the state's right to a share of the value of the earth's possessions found within the borders of the state." (*Ibid.*, p. 145).

permitted in calculating the net earnings. Unless stated otherwise, the term "earnings" will be understood to mean net earnings.

A number of the states employ a tax on earnings, the state laws attempting to define earnings so that the assessor shall have no difficulty in verifying the data filed. In most of the states in which a net earnings tax is used there has been considerable discussion in regard to the deductions which shall be allowed. In mine accounting, as will be noted later, it is now the customary practice with some of the best companies to charge all ordinary development to operating expenses. The term "permanent improvement" includes very little about a mine operated on this plan. Everything is immediately charged to expense unless the item is properly one which represents an unusual improvement, the cost of which may be distributed over a period of years.²⁴

However the net earnings tax as employed in the several states is practically a general property tax, for the mine is assessed at its net earnings or the full amount of the net earnings is arbitrarily taken to be the actual value of the mine and on this base the rate of the general property tax is applied. A true net earnings tax is rather a tax which like an income tax takes annually a fixed percentage of the income or earnings. Levying a tax on net earnings at the general property tax rate

²⁴A notable example of this type of improvement is the stripping of ore in an open-pit mine. Most of the "dead expense" is incurred at the beginning or in the early stages of the operations. When the waste material overlying the ore-body has been removed, the deadwork, corresponding more or less to the sinking of a shaft, is completed and every ton of ore subsequently mined should be charged with a portion of this preliminary expense. In the case of several large open-pit mines, which are still stripping waste, the claim has been made that the total cost of stripping should be deducted from the earnings during the year in which the stripping is done, and that taxes should be figured on the net above this development expense. On the books of the company however this cost of stripping is carried as a suspense account and against each ton of ore as it is mined there is charged its share of the entire development expense. The question at issue seems to be whether the state shall collect a larger share now or defer its claim until later. It is not a matter of tax-dodging but rather a postponement of taxes. The extent and the quality of the ore-body are assumed; the variables that might later affect the earnings, and therefore the taxes, are the future cost of mining and the market price of the metal produced.

is in effect actually appraising the mine to be worth only one year's earnings. The fallacy of this plan in its general application is evident.

If the earnings of a mine are maintained uniform throughout its life, the annual sum of taxes paid will be uniform, during the years immediately prior to the exhaustion of the mine as well as in the first years of production. The tax burden therefore would be distributed throughout the life of the mine.

The objections to the net earnings tax that have been presented are notably as follows:

1. The difficulty of determining what deductions shall be made from the gross earnings.

2. The necessity for more or less inquisitorial inspection of the accounts of the mine.

3. The fact that there may be little relation between the capital paid in and the earnings of a company.

4. Non-productive and unprofitable mines pay no tax whatever.

5. From the view point of the tax officials, there is the objection that the state revenue derived from mines in this way would not be nearly as uniform from year to year as when the general property tax is used, unless the earnings of the mines are uniform.

6. The rate would have to be high in order to collect from mines the same proportion of the earnings as is collected from real property under the general property tax.

In support of the net earnings tax, the following advantages may be noted:

1. As a rule, the taxing unit will secure more revenue from the mines, if the entire life of each mine is considered, than if mines are taxed under the general property tax. The assumption is made that under both systems the same taxes are collected the first year.

2. If depreciation has been properly provided for, and the earnings are uniform, the amount of taxes paid each year during the life of the mine will be uniform, although the value of the mine may be declining at a regular rate.

3. Physical valuation or appraisal is not necessary.

4. There is less expense for administration.

5. Development of mines is encouraged as the unprofitable and unproductive mines are exempt.

From the view point of the mine operator, this system is desirable for the following reason:

6. If the rate is maintained uniform, the taxes will be heaviest when the mine is most profitable and there will be no burden during the development period.²⁵

Income tax. As previously noted, the Federal Government and a few of the states levy a tax upon the income of individuals and of corporations. The essential difference between the so-called "net earnings" tax and an income tax is that every state employing the former levies the tax at the general property tax rate thus practically valuing a mine at one year's earnings, while under the income tax there is a fixed or graduated rate specified which applies only to income. As will be noted in Chapter IX, it has been urged that mines should be taxed upon income and at a rate graduated according to the earnings upon paid-in capital. This proposal contemplates also a definite consideration of the deferment of dividends until after a mine is developed.

The advantages claimed for an income tax as applied to mines are the same ones that apply to income taxation in general, but the following have the more specific application:

1. Income of mines is the true and only measure of ability.
2. The administrative problems have been simplified for the states by the enactment of the federal income tax law.
3. Mines would be taxed when productive, therefore the tax is convenient as compared with the general property tax.
4. There is no pressure or inducement tending to cause careless and wasteful mining.
5. Exploration and development are not impeded.

The objections raised against an income tax or an ad valo-

²⁵The system of mine taxation inaugurated by the Province of Ontario by the Act of 1907 is a good example of the net profits or earnings tax. "All mines which yield an annual profit above the exempted amount of ten thousand dollars pay a flat rate of three percent on such excess. In ascertaining the profits, the gross receipts, or value at the pit mouth, are taken and from this sum is deducted the cost of transportation of the output sold, if borne by the shipper, and actual working expenses including mine wages and salaries, cost of fuel, explosives, power, insurance, and sinking new shafts, and an allowance for depreciation of the plant,—not of the mine. The tax levied in any year is based upon the profits of the preceding year." (Ch. 9, 7 Edw. VII).

rem tax based on capitalization of net income have been summarized as follows:

"1. American property taxes are in general so high and take so large a part of the annual income that if converted into terms of income taxation they would appear excessive. Few legislatures could be persuaded to impose an income tax on mines equal to the share of the net income regularly taken from farms, railroads, and similar enterprises.

2. The property tax is imposed from year to year on idle property or property which for speculative purposes is held out of production, whereas the income tax applies only when the property is worked.

3. With the income tax, uncertainty and possible inadequacy of the tax are likely to result unless the minimum output is regulated by the state."²⁶

Equated income tax. Owing to the difficulty of appraising annually mines having a short life and those having little ore in sight, it has been proposed that typical mines be appraised carefully and the net earnings or income determined for the entire life of the mine; that the ratio between earnings and property value be determined; and that a factor be calculated so that the general property tax rate may be applied to earnings or income and the same tax burden be thereby applied to properties regularly appraised and to those whose income alone is known.²⁷ This would mean that if the general property tax rate is 3 percent and the factor is determined to be 2.4, then the rate applied to incomes of mines would be 7.2 percent.

The advantages claimed for this system of equating income with the value of property are as follows:

1. Ease of administration.
2. Mines are taxed upon actual and not prospective earnings.
3. Taxation according to ability is approximated.
4. Royalties are taxed at the source.
5. There is no effect on conservation of mineral resources and no penalty on development.

The disadvantages are:

²⁶Report of the Committee on Taxation of Mines and Mineral Lands, *Proceedings National Tax Association*, 1913, VII, 390.

²⁷Uglov, W. L. *Bulletin XLI, Wisconsin Geological and Natural History Survey*, 1914, p. 59.

1. The system is based upon the average life for a district or for a group of mines, and occasionally an individual mine may suffer or may escape its just share of taxes.

2. The revenue derived will fluctuate with the earnings.

3. Unprofitable and unproductive mines are not taxed. Unprofitable mines on a royalty basis are taxed.

4. Land held for speculative purposes is not taxed.²⁸

²⁸*Ibid.*, p. 64.

CHAPTER VII

PROBLEMS OF ADMINISTRATION

The administrative problems of mine taxation differ in a number of points from those of taxation of other kinds of property. Particular attention may be directed to the problem of appraisal of mineral properties, to mine accounting and depreciation of mines, and to the cost of administration.

APPRAISAL OF MINERAL PROPERTIES FOR TAXATION. As most of the states employ the general property tax and a number of the others tax the property of non-producing mines, the appraisal of mineral properties for taxation is a problem practically of national interest. In but few states, however, has the subject received the serious attention which its importance warrants. This may be due to several causes: (1) The failure to develop or apply a scientific system of appraisal of property in general throughout most of the states; (2) constitutional limitations upon the methods of assessment; and (3) the opposition of the various interests involved.

In Minnesota, Michigan, Wisconsin, Arizona, Colorado, Nevada, Utah, and Pennsylvania considerable attention has been given to the problem and in the first three there have been appraisals made which have gone a long way toward solving the problem.

In discussing the appraisal of mineral lands, Mr. H. M. Chance suggested that the purpose for which an appraisal of mineral property is desired will determine the choice of method or combination of methods to be used. Among the methods which have been applied are the following:¹

1. The value may be determined by adding to the cost of the land the cost of improvements, and a reasonable remuneration to the party which has successfully developed the property.

2. After the common-practice of real-estate appraisers, the value may be determined by the prices at which property of a

¹Chance, H. M. Appraisal of the value of mineral lands. *Transactions of American Institute of Mining Engineers*, 1904, XXXV, 347.

similar character in the immediate neighborhood has recently been sold.

3. A method elaborated by Mr. J. S. Harris several years ago for the purpose of appraising the value of coal-lands owned by the Philadelphia and Reading Coal and Iron Company has been adopted by many experts for general purposes. By this method the total workable coal in the ground is first determined and valued at a certain sum per ton, this estimate being based either upon what the coal would produce, if leased upon a royalty, or upon the profits of mining it. Using as a basis the rate of increase in production, as shown by past experience, the probable yearly increase of output is calculated, and for these figures the probable revenue is calculated for each year of the period during which the assumed output can be maintained, or until all the coal is mined. Then the probable future earnings of the land, either by royalty or through production, are capitalized at their present money value, by the usual formulas for deferred payments, at a certain assumed rate of discount. The present money-value of coal-land depends largely upon the time at which development is to be commenced, the time elapsing before maximum output is attained, and the time to be occupied in exhausting the tract,—the present money-value decreasing rapidly as any of these variables is increased.

4. The appraised value of the property may be taken as the capitalized value of the yearly earnings which it is estimated will result from the operation of the property at a certain yearly output maintained for a fixed term of years at an average profit per ton extending throughout the whole period, and not providing for any increased output beyond what may be already in sight.

5. The value may be based upon the actual net earnings allowing for such increases and improvements as seem warranted by industrial conditions, treating the property as a business investment and worth the price which the earnings justify, provided it be not greatly in excess of the appraisal value of the land, plant, and improvements as reached by other methods.²

²In commenting on these methods, Mr. Chance said: "The first method may be dismissed without serious consideration, because it is impossible to determine what would constitute a reasonable profit to the operator developing a tract of land, and, further, because this method ignores the value of the business that the operator has established and the enhancement of land-values due to the development of the property.

The second method is discarded for similar reasons, also because

The fifth method is now generally employed in valuing mining properties by representative engineers.³

In appraising mining property, other than improvements and broken ore or stored mineral product, it has been customary for tax officials to classify the various kinds of property as follows: productive mines, non-productive mines, mineral reserves, unexplored mineral lands, mining rights, and leaseholds. Many of the representative and the most important points in the appraisal of mineral properties for the purpose of taxation may be noted in connection with the methods of valuing productive or developed mines which methods will be discussed first. As suggested by Mr. Hoover,⁴ the field of valuation of productive mineral properties may well be treated in sections. In the following discussions an effort has been made to present data and methods in the following order: (a) copper, lead, zinc and precious metal mines; (b) iron mines; (c) coal mines; (d) gold placers; (e) petroleum and natural gas wells; and (f) mineral rights.

it fails to recognize the fact that the price paid for coal property is a measure only of the value placed upon it by the vendor, who, if not in a position to operate it, may be willing to part with it for much less than its real value. In buying from original owners coal operators rarely pay full prices, but almost invariably what they believe to be a small fractional part of the real value.

The third method is most valuable for the purpose for which it is used by Mr. Harris, namely, as a basis upon which reorganizations may be planned, and a new company financed. It may not be adapted for general use, because it is cumbersome, and also because it does not include allowances for the value of established trade and connections.

The fourth method is useful in a majority of cases as corroborative of valuations reached by the fifth method."

³Rickard, T. A. *Sampling and Estimation of Ore in a Mine*. New York, 1904.

Economics of Mining. New York, 1905.

Hoover, H. C. *Principles of Mining*. New York, 1909.

Finlay, J. R. *Cost of Mining*. New York, 1909.

Burnham, M. H. *Modern Mine Valuation*. London, 1912.

Herzig, C. S. *Mine Sampling and Valuing*. San Francisco, 1912.

Eckel, E. C. *Iron Ores, Their Occurrence, Valuation and Control*. New York, 1914.

⁴Hoover, H. C. *Principles of Mining*, p. 1.

COPPER, LEAD, ZINC, AND PRECIOUS METAL MINES

It has been suggested that both positive and speculative factors must be considered in determining the value of a metal mine. The positive value or character of the ore as it is known to exist in the ground may be determined by an examination and the sampling of the mine and the metallurgical testing of the ore. The quantity of mineral product actually available must be determined by measurements made upon the blocks of ore exposed. The mining engineer in making an examination of a mine may find it necessary to cut samples from the solid ore in place every five or ten feet along the exposed faces of every block of ore. This work of taking the samples, together with the work of surveying the mine in order to determine the location of the points at which samples were taken and the volume of blocks sampled, followed by the task of assaying each sample may require the full time of several trained men for many days and may cost several thousand dollars for each large mine examined. It cost \$7,000 to sample one well-known mine, and it cost \$12,000 to do the same work in a neighboring property. This does not include the fee of the engineer in either instance.⁵ In appraising an operating mine for taxation it would usually be unnecessary for the mine valuer to do more than to check and verify the sampling which had previously been done. It has been held by some opponents of the ad valorem system of mine taxation that the expense even of checking the sampling of large precious metal mines will make the system prohibitive in those states in which there are many mines of this character.

There is also to be considered the question of developing, equipping, and operating the mine and this involves the variable of technical skill and managerial ability. Finally, there are the speculative elements of continuity and character of the orebody beyond the ore visible at the time of examination and the possibility of a change in the market price of the product for all except gold mines.⁶

Speculative features have entered in various ways into the appraisal of mines for taxation. In some states it has been urged that the interest rate used in valuing a mine should be as high as the rate that investors normally expect to receive from mining investments; others favor the practice of making

⁵Rickard, T. A. *Sampling and Estimation of Ore in a Mine*, p. 14.

⁶Hoover, *Principles of Mining*, p. 1.

percentage deductions for various factors of risk⁷ such as the following:

"1. The risk of continuity in metal contents beyond sampled faces.

2. The risk of continuity in volume through the blocks of ore estimated.

3. The risk of successful metallurgical treatment (due to changing character of the ore).

4. The risk of metal prices, in all but gold.

5. The risk of properly estimating costs.

6. The risk of the extension of the ore beyond exposures.

7. The risk of management."⁸

It is to be assumed that in valuing mines for taxation the risk factor will be given the same weight as it is usually given by engineers in appraising mines for sale or purchase.

The basic factors in the valuation of a mine are (1) average market prices for the product; (2) average costs of mining and marketing the product; (3) the life of the mine, and (4) the interest and discount rate.⁹

With these data determined or given, the present worth of a mine producing annually a fixed tonnage of a uniform quality may be readily calculated from the following formula:¹⁰

$$\text{Present value} = \frac{100 \text{ } p \text{ } A \text{ } (z \text{ } S \text{ })}{x \text{ } z \text{ } (z \text{ } S \text{ } + 100)}$$

A = number of tons in the deposit; x = number of years required to mine this tonnage; p = profit per ton; z = rate of return expected; d = rate + 1 at which the sinking-fund can safely be invested.

$$S = \frac{d \text{ } (d^x - 1)}{d - 1}$$

With certain types of mines, as has been noted, the sampling and estimation of the ore-body may mean a difficult and expensive task which would be practically out of the question for the appraiser to undertake annually for each mine in the tax district.

⁷*Infra*, p. 191.

⁸Hoover, *op. cit.* p. 182.

⁹Finlay, J. R. *Cost of Mining*, p. 5.

¹⁰*Ibid.*, p. 16. See also Hoskold, H. D. Valuation of mines of definite average income. *Transactions of American Institute of Mining Engineers*, 1902, XXXIII, 777.

In the two types of metal mines, other than iron, which have been appraised on an ad valorem basis by state appraisers, no attempt has been made to sample the mines. In the Michigan native copper mines, sampling would be impractical. In the Wisconsin zinc district it has been customary to estimate ore reserves from platted drill holes, put down in exploring the deposit. Experienced mine operators having the records of the holes can estimate very closely the value of a deposit and the same data are available to the appraiser for the tax commission.¹¹

The problem then is rather one of verifying the data available, of checking tonnages, of verifying sales, prices, and costs, and of estimating profits. With a known life of the mine, the present worth may easily be calculated.

In appraising the short-lived mine or the mine whose development is generally not sufficient to warrant an estimation of life, many factors must be considered,—and these can be estimated only by the experienced appraiser who is familiar with the geology of the district.¹² Arizona was the first state to attempt an appraisal of precious metal mines, or mines carrying important quantities of precious metals as by-products.¹³

IRON MINES

The Minnesota, the Michigan, and the Wisconsin Tax Commissions have had considerable experience in appraising iron mines. The important features of the work of each commission will be presented later.¹⁴

The valuation of iron mines rests fundamentally upon the same basal factors as the valuation of gold, silver, copper, zinc, and lead mines,—namely, (1) average costs per unit of product, (2) average prices per unit of product, (3) average number of units produced annually, (4) life of the mine, and (5) rates of interest and discount. The economic conditions controlling the iron industry, and regularity and extent of iron-ore deposits, and the wider distribution of iron-ores have caused many appraisers to consider iron-ore deposits separately from those ores which carry commercial quantities of the precious metals.

¹¹Uglow, W. L. Methods of mine valuation and assessment. *Bulletin XLI, Wisconsin Geological and Natural History Survey*, 1914.

¹²This will be discussed later in considering the experience of the Wisconsin appraiser in the Platteville zinc district.

¹³*Infra*, p. 198.

¹⁴*Infra*, Minnesota, p. 175; Michigan, p. 194; Wisconsin, p. 185.

Eckel in discussing the valuation of iron-ore properties suggests¹⁵ that for such properties there may be three different bases on which the valuation may be placed: (1) Capitalization of smelting profits, (2) capitalization of royalties or mining profits, and (3) market or replacement valuation. In capitalizing the smelting profits, the same line of thought is followed as is followed in gold mining, namely, that the treatment and reduction of ores is incidental to mining and therefore for example, the profit of the reduction of the gold ores is simply a part of the profits of gold mining, defining mining in a comprehensive way. Similarly, iron smelting may be considered as a branch of the iron mining business. Logically, iron smelting stands in the same relation to iron mining as gold milling does to gold mining,—but the trade customs have been different. The “method of valuation which has been here suggested¹⁶ is clearly justifiable,¹⁷ but has not been adopted in the past.”

In summarizing the problems of iron-ore property valuation, Eckel emphasizes¹⁸ the importance of finding a market for the iron-ore of the particular chemical composition of the deposit to be valued. In a going concern the appraiser would have available the accounts of the company showing the actual prices received for ores and could estimate the value of the deposit or blocks of the deposit upon these records of sales.¹⁹

The interest and discount rate is of importance particularly in valuing deposits of iron ore or other minerals of such extent that the mines operating upon them will have a comparatively long life. It has been suggested that some mines may have too much “ore in sight.” This statement may apply to either of two conditions. The company may have bought lands or mineral rights in order to secure assured reserves, and the price paid for these reserves may at compound interest amount to so great a sum that by the time the ore is mined, no profit will result from the investment. Or, the company, upon lands previously owned, may

¹⁵Eckel, E. C. *Iron Ores*. The basal factors in ore valuation, p. 109.

¹⁶*Ibid.*, p. 110.

¹⁷It is interesting to note the complications that such a system of valuation might provoke if the State of Minnesota should attempt to tax iron-ore on the basis of the profits earned by the iron and steel plants located at Pittsburgh.

¹⁸*Ibid.*, p. 113.

¹⁹The question of composition of ores, marketability, etc., is of importance, however, in determining the prospective value of unproductive mines and mineral lands containing known tonnages of sampled ore.

make expenditures for driving development openings and thereby may open additional reserves; but the expenditure upon these new openings, when considered as an investment and charged with interest compounded, may amount to so great a sum by the time the ore is mined that no profit may result. It is evident therefore that the interest and discount rates and the carrying charge are important in estimating the present worth of extensive mineral deposits.

The determination of the carrying charge upon ore or other mineral in the ground has aroused much discussion particularly in the iron-mining and the coal-mining states. "The selling value of a natural agent—be it agricultural, an urban site, a developed mine—is a capitalization, at the current rate of interest, of the fixed income which accrues to its owner. It varies, therefore, inversely to the rate of interest."²⁰ In the Finlay appraisal of the iron mines of Michigan the rates used were six percent on the investment and four percent on the sinking-fund. In the so-called Hill ore lease four percent was taken as a basis for calculation. "Taking everything into consideration, it does not seem justifiable, in considering long-time ore calculations, to assume a carrying rate of less than six percent. It does not seem probable that under any ordinary conditions in the American money market, any steel company whatever could secure money at a lower rate if ore reserves were the only security offered."²¹ All things considered, we are not likely to under-estimate the matter much by assuming six percent as the minimum carrying charge or discount rate. Even at this rate the discounting effect is more than might casually be expected. If ore is being mined on a royalty basis of twenty-five cents per ton, the royalties for the tenth year of the lease can be given a present value of only fourteen cents per ton; while those to be earned in the fortieth year have a value now of only two and one-half cents a ton. In other words, a property which can not be worked out in forty or fifty years does not derive much additional present value from the ore still in the ground at the end of that time."²²

In commenting upon the method of valuation of iron mines used by Mr. J. R. Finlay, the importance of the assumption of the interest and discount rate was discussed at length by Mr.

²⁰Taussig, *Principles of Economics*, II, 97.

²¹In 1907 the Spanish-American Iron Company attempted to make a loan by a series of 6 percent bonds, secured by Cuban iron-ore deposits. These bonds were sold at 98 1/2. Eckel, *op. cit.*, p. 177.

²²*Ibid.*, p. 177.

E. E. White.²³ He cited various authorities to show that in addition to a fund for the redemption of capital, the conservative investor generally expects a return of not less than ten percent upon mining investments. He suggested that Mr. Finlay's method of valuing the Lake Superior iron mines might be successfully used if the five factors should be determined as follows:

"1. The average cost of production at lower ports for five years, plus or minus the difference in cost per ton of taxes due to such revaluation.

2. The estimated ore reserves; ore based on diamond drilling to be estimated very conservatively.

3. The average production per year for the last five years, if the mine has been equipped to produce actively for that length of time; otherwise, for the number of years during which it has been so equipped.

4. The average selling price at lower lake ports for 18 years.

5. The present value of a \$1 per year dividend based upon a 10 percent return on the investment and capital returned in ten years of operation by investment of an annual sum at 3 percent. This would mean 12 to 15 years from the beginning of development before capital would be replaced."

COAL MINES AND LANDS

The valuation of coal mines has received much attention from mining engineers, but the appraisal of coal mines for the purpose of taxation has not received the attention of taxing officials to the same extent that metal mines have in the Lake Superior region. However, the coal mines of Michigan were appraised for taxation in 1911 and the assessment of anthracite mines in Pennsylvania and of bituminous coal mines in Virginia and West Virginia has provoked much discussion and some litigation. In most of these coal mining districts the problem of coal mine valuation has been almost inseparably identified with the valuation of lands and leaseholds.

A survey of the field of valuation as applied to coal lands has been made by the United States Geological Survey in connection with the examination and classification of the mineral lands of the public domain. The Geological Survey investigated the royalty value, the sale price, the bonding value, and the

²³*Transactions of American Institute of Mining Engineers*, 1913, XLV, 304.

TABLE No. 2.
ASSESSMENT VALUE OF COAL LANDS PER ACRE.
EASTERN COAL FIELDS.

Location	Range of assessments	Ratio assessed to assumed value	Assumed value
Pennsylvania:			
Luzerne County.....	\$8,000	8-10	\$10,000
Clearfield County.....	2-50	$\frac{1}{4}$	8-200
Cambria County.....	10-50	$\frac{1}{3}$	30-150
Fayette County.....	400-600		
Westmoreland County.....	430-680		
Ohio:			
Belmont County.....	6-30		
West Virginia:			
Kanawha County.....	20-100	$\frac{1}{3}$	60-300
Raleigh County.....	200		
McDowell County.....	250		
Kentucky:			
Henderson County.....	10-12		
Tennessee:			
Caliborne County.....	25-40		65-100
Alabama:			
St. Clair County.....	1-6		
Indiana:			
Sullivan County.....	15		20-110
Greene County.....	15-35		
Warrick County.....	5-6		
Illinois:			
Grundy County.....	14-37	$\frac{1}{3}$	40-110
Bureau County.....	16		
St. Clair County.....	25-50		
Franklin County.....	15-35		25-50

TABLE NO. 2—Continued.

WESTERN COAL FIELDS.

Location	Average assessments	Range of assessments	Ratio assessed to assumed value	Assumed value
Colorado:				
Boulder Co.....	\$68.00		$\frac{1}{3}$	\$204
Delta Co.....	20.00	\$20-50	$\frac{1}{3}$	60-150
El Paso Co.....	51.66		$\frac{1}{3}$	155
Fremont Co.....	29.46	10-40	$\frac{1}{3}$	30-120
Garfield Co.....	37.40	10-50	$\frac{1}{3}$	30-150
Gunnison Co.....	33.00	15-80	$\frac{1}{3}$	45-210
Huerfano Co.....	28.00	2-70	$\frac{1}{3}$	6-210
Las Animas Co.....	13.50	5-75	$\frac{1}{2}$	10-150
Mesa Co.....	20.00		$\frac{1}{3}$	60
Pitkin Co.....	16.34	4.50-30	$\frac{1}{3}$	13.50-90
Weld Co.....	25.97			
Utah:				
Emery Co.....		10		25

assessed value of coal lands in the United States in 1910.²⁴ It was found that county assessors commonly assess only developed coal lands and these upon the coal actually being worked. Where the coal land is most valuable the method of assessment has usually been worked out with much care.

Table No. 2 gives data from selected points, including the range of assessment of coal in developed properties (exclusive of improvements) down to assessments on undeveloped lands off railroads and of small or unknown value, the ratio between the assessed and the assumed real value, and the assumed real value as estimated from the assessments.²⁵

In 1914, Mr. H. M. Chance collected data²⁶ upon the county assessments of coal lands in the leading coal mining states as shown in Table No. 3.

²⁴Ashley, G. A. The valuation of public coal lands. Bulletin 424, *United States Geological Survey*, 1910.

²⁵*Ibid.*, p. 33.

²⁶Chance, H. M. Appraisal of coal land for taxation. *Bulletin, American Institute of Mining Engineers*, July, 1914, No. 91, p. 1466.

TABLE NO. 3.
COUNTY ASSESSMENTS OF COAL LANDS.

State		Highest assessed value of coal, not including surface, per acre	Lowest assessed value of coal, not including surface, per acre
Alabama.....	"Supposed to be assessed at 60 percent but rarely is assessed at more than 25 percent of value."	\$ 1.00 to \$40.00	\$.12 to \$ 3.00
Arkansas.....	"Supposed to be assessed at 50 percent, or less, of value at voluntary sale."	5.00	2.50
Colorado.....	"Depends on accessibility to railroads."	60.00	25.00
Illinois.....	"Usually at about 20 percent of voluntary sale value."	75.00	2.00
Iowa.....	"Undeveloped lands not assessed as coal lands."	10.00 to 30.00	6.00 to 25.00
Kansas.....	"Supposed to be at its market value."	20.00 to 60.00	5.00 to 10.00
Kentucky.....	"Assessors often adopt statement of owners as to value." (Data not complete).	2.00 to 15.00	1.00 to 4.00
Ohio.....	"Attempt to approximate value." "More guesswork than anything else." "Actual values tried to be ascertained."	20.00 to 80.00	10.00 to 20.00
Pennsylvania	Methods vary greatly. (Bituminous region only).	10.00 to 900.00	5.00 to 50.00
Tennessee.....	Data incomplete	20.00	3.00
Utah.....	Data incomplete.	20.00	10.00
Virginia.....	At fair market value as per Act of March 7, 1912.	100.00 to 500.00	1.00 to 8.00
W. Virginia.....	"Supposed to be at voluntary sale value."	6.00 to 180.00	3.00 to 15.00
Wyoming.....	"On net value of output." (Data incomplete).	20.00 to 30.00	20.00

The investigation made by Mr. Chance discloses the fact that few of the states have adopted uniform methods applying to all parts of the state. In general, four methods of assessment of coal lands have been attempted or suggested.²⁷

First: Valuations based on actual sales.

Second: Valuations based on foot-acres of coal remaining in the ground or remaining available.

Third: Valuations based on royalty values.

Fourth: Valuations based on capitalized estimated profits.²⁸

The application of these methods in Pennsylvania will be considered later.²⁹

In discussing these methods in a general way, Mr. Norris concludes that "none of the suggested or attempted methods has resulted, or can result, in an equitable valuation, fair and just to both the public and the owners of coal land."³⁰ On the other hand, Mr. Chance in appraising the coal mines of Michigan for taxation in 1911 used as a "logical method" the following procedure: The present value of the proved and developed coal tonnage was determined, using as a basis an assumed present money value of a ton of coal in the ground existing under average mining conditions. The present value of undeveloped coal was assumed to be a definite percentage of the present value of developed coal. Various factors were adopted by which the assumed base was reduced in order to allow for local irregularities, risks, etc. A valuation for a property was thus determined, it being practically a capitalization of estimated profits during the life of the mine.

As previously noted the United States Geological Survey has placed a valuation upon the coal lands of the public domain.³¹ Various factors have been considered and definite rules have been formulated from which may be determined the price to be charged for lands containing coal of a certain quality and thickness. Deductions are allowed according to the variations in

²⁷Norris, R. V. Appraisal of coal land for taxation. *Bulletin, American Institute of Mining Engineers*, April, 1915, No. 100, p. 868.

²⁸These same methods have been used in principle at least in some of the metal mining districts.

²⁹*Infra*, p. 204.

³⁰*Bulletin, American Institute of Mining Engineers*, No. 100, p. 873. See also the paper by Mr. Norris on "The valuation of anthracite mines", presented at the International Engineering Congress, San Francisco, 1915.

³¹*Bulletin 537. United States Geological Survey*, 1913, p. 96.

thickness, inclination of bed, depth below the surface, and proximity to railroads.³²

"In certain counties in western Pennsylvania, a fixed value of coal land for a certain location is placed upon a certain amount of coal land in connection with a going operation, and all acreage in excess of this fixed amount, which is called operating coal, is assessed at a lower value, usually about one-half to three-fourths of the value attached to the operating coal, and each year the amount of coal actually mined during the year is deducted from the cheaper or back coal."^{32a}

GOLD PLACERS

Only a few states have important placer deposits and little literature is available to show the actual methods employed by assessors in appraising mines operating upon such deposits. The

³²In addition to the citations previously made other important references upon this phase of valuation of mineral properties are as follows:

Ashley, G. H. Public coal lands and taxation. *Coal Age*, 1913, IV, 783.

Chance, H. M. Appraisement of Michigan coal lands. *Coal Age*, 1912, II, 13, 51.

Coulthard, R. W. Principle of coal evaluation. *Colliery Engineer*, 1915, XXXVI, 22.

Crane, W. R. Coal-land valuation as a basis for taxation. *Coal Age*, 1914, V, 1055.

Fohl, W. E. Valuation of coal lands. *Colliery Engineer*, 1915, XXXVI, 64-66.

Griffith, W. Assessing and taxing coal in the ground. *Colliery Engineer*, 1913, XXXIII, 669.

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Report of Coal Tax Commission, Northumberland County, Pennsylvania, 1909.

Smith, A. The rating of coal mines. *Transactions Institution of Mining Engineers*, 1899-1900, XVIII, 171, 228.

Smith, J. B. On colliery depreciation. *Transactions Federated Institution of Mining Engineers*, 1890, II, 211.

Taylor, S. A. Valuation of coal lands. Paper before the International Engineering Congress. *Coal Trade Bulletin*, Oct. 1, 1915, p. 30.

^{32a}Taylor, S. A. Valuation of coal lands. *American Coal Journal*, October 16, 1915.

methods of valuing alluvial gold deposits employed by mining engineers have been described in various works upon gold dredging and placer mining and in numerous articles in the technical press.³³

The valuation of gold placers that have been drilled thoroughly may be made upon the same basis as the valuation of other types of mineral properties, notably by determining the present value of the profits which may be expected from working the deposit. Experienced operators have had opportunity to compare the recovery of gold with the reports of drillers and various factors have been determined for different kinds of dredging ground, as, for example, one factor for compact gravel, and others for medium gravel, for loose gravel, and for loose gravel and sand with much water. Factors may be applied for the gross amount of gold recoverable under general working conditions, although many of the largest operators report that it is impossible to give any fixed percentage to offset the various conditions of operation.³⁴ "The life of dredging propositions differs from that of vein mines in that dredging propositions can be closely figured, and, unlike the latter industry where the profit in sight is figured as a guarantee for the return of only a part of the capital invested, the redemption of the cost of the property and equipment must be allowed for during the life in sight, which is usually determined by having the dredge equipment of sufficient capacity to turn over the ground in ten years, as the life of a dredge with a wooden hull is generally figured at this length of time."³⁵ The rate of interest, after proper allowance for the

³³Aubury, Lewis E. Gold dredging in California. Bulletin 36, 1908; Bull. 57, 1910, *California State Mining Bureau*.

Earl, T. C. *Gold Dredging*. London, 1913.

Hodgson, J. E. *The Dredging of Gold Placers*. London, 1911.

Purinton, C. W. The sampling of placer deposits, in Herzig, C. S. *Mine Sampling and Valuing*. San Francisco, 1914.

Weatherbee, D. *Dredging Gold in California*. San Francisco, 1907.

Decoto, L. A. Valuation of dredging ground. *Mining and Scientific Press*, 1914, CVIII, 773.

Graves, T. A. Examination of placer ground. *Ibid.*, 1914, CIX, 991.

Herrick, H. N. Valuing dredging ground. *Ibid.*, 1913, CVII, 1061.

Herzig, C. S. Valuing of dredging ground. *Ibid.*, 1914, CIX, 563.

Jennings, R. C. Valuing placer ground. *Ibid.*, 1914, CIX, 845.

Steel, D. Valuing placer ground. *Ibid.*, 1914, CIX, 845.

³⁴Bulletin 57, *California State Mining Bureau*, p. 36.

³⁵*Ibid.*, p. 36.

sinking-fund has been made, is generally taken at a minimum of ten percent.

In California mines are appraised on an ad valorem basis.

PETROLEUM AND NATURAL GAS WELLS

The appraisal of oil and gas wells has offered many difficulties to assessors in the states appraising and taxing mineral properties upon an ad valorem basis.

The important oil producing states in 1912 and 1913 were Oklahoma, California, Illinois, West Virginia, Pennsylvania, Ohio, Texas, Louisiana, and Indiana. The states leading in the production of natural gas were West Virginia, Pennsylvania, Ohio, Oklahoma, Kansas, Louisiana, and California. With the exception of Oklahoma all of these states tax mines and oil and gas wells under the general property tax. Except for the reports published by the Tax Commission of West Virginia there are available but few data upon the experience of the officers of oil and gas states in taxing oil and gas wells. The logical and practically the only method of valuing an oil and gas well or property is upon production and profits. Definite instructions on valuation of oil wells are given to the local assessors in but ten states.

It has been said that few of the oil-producers appreciate what the real cost of production is.³⁶ Obviously, it is essential that producers should know what is really income if property is to be appraised on the basis of earnings and if Federal taxes are to be collected on income.^{36a}

In discussing "depreciation as applied to oil properties," Mr. P. W. Henry has presented valuable data on the cost of production and has demonstrated what items may properly be taken into account in estimating the depreciation of oil properties.³⁷

Data used in the study of the subject were based upon estimates of the United States Geological Survey for the State of California as a whole. Considering the constant annual increase in production and the danger from water intrusion, it seemed prudent to adopt a life of 25 years for the field. A

³⁶Requa, M. I. Present conditions in the California oil-fields. *Transactions of American Institute of Mining Engineers*, 1911, XLIII, 841.

^{36a}As noted in Chapters III and IV, Louisiana imposes a license tax upon the business of mining. The tax is based upon the gross value of the product of wells and mines.

³⁷Henry, P. W. Depreciation as applied to oil properties. *Bulletin, American Institute of Mining Engineers*, 1915, No. 97, p. 31.

depreciation rate of 4 percent per annum was used for the oil lands. For individual wells the life may be shorter and the rate would necessarily be correspondingly higher. An average life of all wells drilled, including dry wells, is suggested as 10 years. In case the land should be valuable for other purposes after the oil has been exhausted, a depreciation rate corresponding to the actual depreciation due to the exhausting of the oil should be used. The depreciation rate on equipment is figured at 7 percent. Summing up the depreciation charges which were calculated for particular operations, Mr. Henry concludes that the following charges are appropriate:

	Per barrel
Depreciation of oil lands (royalty).....	\$0.555 to \$0.110
Depreciation on field equipment.....	0.029 to 0.052
Depreciation on wells and appurtenances...	0.052 to 0.071
<hr/>	
Total depreciation	\$0.136 to \$0.233

These figures were presented with the idea, not of supplying absolute data that could be applied in general, but rather in order to show what effect a "proper charge for depreciation has upon the cost of producing oil in a state where, during the past few years, prices at the well have ranged from \$.30 to \$.85 per barrel."³⁸

In addition to this charge for depreciation, allowance must also be made for renewals and repairs. The actual cost of California oil is shown by the following statement:

	Per barrel
Pumping	\$0.04 to \$0.05
Miscellaneous field expense	0.04 to 0.06
Repairs and renewals.....	0.04 to 0.05
General expense	0.02 to 0.04
<hr/>	
Total direct cost	\$0.14 to \$0.20
Depreciation as above	0.14 to 0.23
<hr/>	
Total cost ³⁹	\$0.28 to \$0.43

³⁸*Ibid.*, p. 28.

³⁹The foregoing data have been introduced in order to give a basis for comparison with other fields. It should be noted particularly that these data are based on a 4 percent rate of depreciation for oil lands, 7 percent for equipment, and 10 percent on the cost of individual wells and appurtenances.

Mr. William Forstner in discussing the valuation of oil lands⁴⁰ divides oil properties into eight classes as follows:

1. Properties with producing wells and surrounded by producing properties.

2. Properties surrounded by producing properties, but not developed.

3. Properties with producing wells, but only partly surrounded by producing territory.

4. Properties partly surrounded by producing territory, and undeveloped.

5. Properties with producing wells, but at a short distance from other producing territory.

6. Properties at a short distance from producing territory, but undeveloped.

7. Properties with producing wells, but at a great distance from other producing territory.

8. Properties at a great distance from other producing territory and undeveloped.

In the opinion of Mr. Forstner, the yearly returns of California properties in the several classes should be at the following rates:

Class 1, 16 to 25 percent; Class 2, 23 to 28 percent; Class 3, 18 to 27 percent; Class 4, 24 to 33½ percent; Class 5, 24½ to 33 percent; Class 6, 30 to 42 percent; Class 7, 31 to 40½ percent; Class 8, no estimate made as the property can not be valued.

Data on the Illinois field have been collected by Mr. R. S. Blatchley.⁴¹ The cost of drilling wells⁴² and of operating leases⁴³ furnishes a basis for valuation of Illinois oil properties. The cost of operating the lease is almost negligible when considered in connection with the earning power of the wells. In some of the counties the operating profits have been low, while the Clark county fields "have been among the most profitable in the world because of the low cost of development and the high returns. The essential feature in operating is to overcome first cost and the interest on the investment. In the shallow fields eight wells steadily making two and even one barrel per day are found to be profitable."⁴⁴ Statistics are given to show that the profits

⁴⁰*Mining and Scientific Press*, 1911, CIII, 578.

⁴¹Blatchley, R. S. The oil fields of Crawford and Lawrence counties. *Bulletin 22, Illinois Geological Survey*, 1913.

⁴²*Ibid.*, pp. 153, 160.

⁴³*Ibid.*, p. 161.

⁴⁴*Ibid.*, p. 161.

resulting to one company operating 100 wells will give an average net income of \$3,000 per month. The valuation of producing wells is considered on a strictly commercial and conservative basis. Purchasing companies gauge the output of a well for ten days and determine the average daily yield. The price per barrel for a producing lease is from \$400 to \$500. A 40-acre lease producing 500 barrels per day would sell at approximately \$200,000 and with a reasonable decline in production should pay for itself in about three years.⁴⁵ The total yield per acre of oil fields varies widely; some have produced only 500 barrels or less per acre while others have produced from 10,000 to 50,000 barrels.⁴⁶ The reports do not indicate what amounts may properly be charged off to depreciation.

In West Virginia the appraisal of oil wells is made by the local assessors acting under instructions from the State Tax Commissioner. "The royalty interest in a well-settled producing well is worth in the market for commercial purposes \$1250 for each barrel of oil produced every 24 hours; while the working interest is worth \$1000 for each barrel produced in 24 hours."⁴⁷

From the foregoing it is evident that oil properties are bought and sold on the basis of production and it seems logical to presume that oil properties can be appraised on much the same basis.

MINERAL RIGHTS

The subject of mineral rights has been discussed at some length under several of the foregoing headings, but it may be well to review in general the experience of the states and to note the present tendencies in valuing this type of property. In general the coal-mining right, when not owned by the owner of the surface, is assessed as the property of the individual or corporation claiming ownership. In a number of the states exceptions to this rule are made when there is no definite knowledge of the quantity and quality of the coal. In several of the ore mining states laws have been enacted which prescribe that mineral rights shall be taxed to the owner.

⁴⁵*Ibid.*, p. 162.

⁴⁶According to the U. S. Census Reports, 1910, Vol. XI, the oil fields of Illinois had a surplus above operating expenses amounting to \$5,491,869 in 1909. Out of this surplus taxes amounting to \$72,107 were paid, or 1.32 percent of the surplus.

⁴⁷*Instructions to Assessors*, 1910, West Virginia, pp. 8, 15, 16.

In many instances the mineral rights of unexplored lands have been reserved when the surface has been sold. When Mr. Finlay appraised the mining property in Michigan he made the statement that no means were found for placing a value on unexplored iron ore formation. "If we could compare an area of fresh iron lands with another area that had been explored and had proved to contain a certain tonnage of iron ore, we might then rationally assume that the undeveloped land would reduce somewhat in the same proportion, but it has been impossible to make any such comparison."⁴⁸

Professor A. C. Lane in discussing the valuation of mineral rights points out that there is a demand for mineral rights, that they are bought and sold, and that they can be appraised on this basis. He discussed the problem carefully for the Lake Superior copper district and concluded "that mineral rights have a value which is but a small fraction of the selling price. It is possible to determine an average value for them which may be called the taxation value. The actual return to a given small holder of a small area of mineral rights will depend partly upon its accessibility but largely upon the ability of himself or his neighbors to hustle and get his tract developed sooner than the tract of someone else. This personal ability is a thing which the state can not foresee nor tax."⁴⁹

In discussing the taxation of leaseholds, Mr. Chance calls attention to the great difference among the states in the taxation of leaseholds. "The equity of a lessee in the coal is not assessed as taxable property in Alabama, Arkansas, Colorado, Kansas, Missouri, Utah, and Virginia. Such equity may be assessed as taxable property in Illinois, Iowa, Kentucky, Tennessee, Ohio, Pennsylvania, West Virginia, and Wyoming, but the practice is not uniform throughout any one of these states; in the aggregate only a comparatively small number of leaseholds being assessed for taxation. The whole value of the coal held under lease is usually assessed to the owner of the property, the equity of the lessee being disregarded."⁵⁰

⁴⁸Finlay, J. R. *Appraisal of Mining Properties of Michigan*, p. 60.

⁴⁹Lane, A. C. Taxation value of mineral rights. *Engineering and Mining Journal*, 1912, XCIV, 897.

See also: McDonald, P. B. Taxation of mineral rights in Michigan. *Eng. and Min. Jour.*, 1912, XCIII, 1908.

Fourth Biennial Report, Minn. Tax Com., 1914, chap. VII.

⁵⁰Chance, H. M. The appraisal of coal land for taxation. *Bulletin of American Institute of Mining Engineers*, July, 1914, No. 91, p. 1461.

VALUATION OF MINES AS AFFECTED BY TAXES

Many mining engineers have assumed that the effect of all taxes upon mining property is to reduce the earning power of the property and likewise the value of the property. In general this assumption is correct but there are times when the burden of the tax may be shifted to the consumer of the mineral product and the earning power of the mine would not be reduced directly on account of the tax.^{50a}

The general presumption is that taxes upon mines are levied for the sole purpose of raising the necessary public revenue. It is usually argued:

1. If the tax is general or continuing or permanent, the burden will fall upon the consumer. A tax which affects mines nationally will usually result in an increased price for mineral products (except gold) and the margin of profit will not be reduced materially if the demand for the product is not affected by the higher prices.

2. If the tax is local or statewide it can not be shifted for the product of the mine must be sold in competition with that of competing mines in other states. These competing mines in other states may not be taxed as heavily and are in a position to continue selling their product at the same price. Therefore the tax levied within state boundaries can not be shifted easily.

3. If a tax varies with the proceeds or with the quality of the product it can not be shifted. Such a tax falls more heavily upon rich mines than upon poor ones and, as it can not be shifted, it obviously reduces the amount available for the payment of dividends.

4. If the tax falls upon a product which is monopolized the effect is not definite as it may be difficult for the producer to increase the price of the product, particularly when the consumer may substitute something else for the product which is taxed. The effect of a tax on anthracite would undoubtedly mean that in certain localities and industries less anthracite would be burned and more bituminous coal. Generally, however, the consumer pays the tax, the amount available for the payment of dividends is not lessened, and the value of the mine is not reduced.

^{50a}For a general discussion of this problem in taxation see:

Adams, H. C. *Science of Finance*. Book II, chapter IV.

Seligman, E. R. A. *Shifting and Incidence of Taxation*.

Plehn, C. C. *Introduction to Public Finance*. Chapter X.

Professor Seligman says that a tax is paid by the man who owns the property at the time the tax is first imposed. To illustrate this he cites the levying of a tax amounting to \$.25 an acre on land that has been valued at \$20 an acre. This land has been valued at \$20 on account of earnings of \$2 per acre, money at 10 percent. The tax will reduce the earnings to \$1.75 per acre and the value of the land will fall immediately to \$17.50. There has been no change in the productiveness of the land but the government has automatically become a joint owner to the extent of the capitalized value of the tax, namely \$2.50. He continues that in a sense the owner of the property at the time the tax is first levied pays the tax for all time, although there is an annual payment of taxes during the continuance of the tax upon this property.

The usual effect of a tax is to reduce the level of profit for taxes generally come out of income if they can not be shifted. The value of mining property is reduced as taxes become heavier and unproductive property may have no present value due to the facts that the annual taxes at compound interest may amount to more than the earnings.

An investigation of the problem of interests and discounts in connection with the mining of ore bodies subject to annual taxation led Mr. W. L. Uglow to the conclusion that "an ore body held in reserve for $33\frac{1}{3}$ years has no present value if taxes are levied at three percent. The effect of this tax factor may even be great enough to impede the development of a reserve for more than five or six years in advance, or to cause the wasteful depletion of ore that would normally last longer than that period."⁵¹

In discussing the taxation item in the valuation of mines, Mr. R. B. Brinsmade presents⁵² the following:

Let V = value or present worth of a \$1 dividend to be assessed by taxation.

a = annuity to be paid to sinking-fund.

r = rate of interest earned on sinking-fund.

R = rate of interest earned on investment.

t = current rate of taxation.

n = number of years dividend is to be earned.

⁵¹Uglow, W. L. Methods of mine valuation and assessment. *Wisconsin Geological and Natural History Survey*, 1915, Bul. XLI, 46.

⁵²Brinsmade, R. B. Valuation of iron mines. *Transactions of American Institute of Mining Engineers*, 1913, XLV, 324.

$$\text{Then by suggested system } \$1 = (R + t) V + a \quad (\text{A})$$

$$\text{and from algebra } a = \frac{V r}{(1 + r)^n - 1} \quad (\text{B})$$

Substitute in (A) the value of a in (B) and

$$1 = (R + t) V + \frac{V r}{(1 + r)^n - 1} \quad (\text{C})$$

Solving (C) for V ,

$$V = \frac{1}{R + t + \frac{r}{(1 + r)^n - 1}} \quad (\text{D})$$

EXPERIENCE OF MINING STATES

The experience of several of the important mining states will be considered in detail in order to present adequately the problems of appraisal of the various types of mineral properties.

Minnesota

When the system of taxing iron mines upon the tonnage of ore produced was discontinued in Minnesota in 1897, the general property tax was again made effective and it became necessary to appraise the mines. Two distinct types of mines are operated in this state, namely, open-pits and mines worked through shafts. Until 1907, practically the same methods of appraisal that had been used in other mining states were used in Minnesota but there prevailed generally a sentiment that the mines were not paying their full share of taxes. The Minnesota Tax Commission was created in 1907 and a resolution of the State Legislature passed in April, 1907, called the attention of the Commission to the need of a revision of the assessment of the mines and mineral lands,—the resolution advising that the total assessed value should be raised to approximately \$225,000,000. During the session of the legislature a committee was appointed to “investigate the best methods of taxing the iron ore properties.” This committee reported that the ore properties were assessed at only one-fifth the amount at which they should be assessed. The Tax Commission collected all data available concerning the iron mines and prospects, at that time numbering 2,116, and proceeded to classify the mines upon the technical and commercial data that were secured. After this

classification had been made, the mines and lands were valued and the operators were given an opportunity to show at a public hearing why the increased valuations should not be entered upon the tax rolls.⁵³

The full plan and the method of classification and valuation were presented at this meeting. The factors taken into consideration in the valuation were: (1) Geological conditions; (2) difficulty of mining; (3) character of the ore; and (4) character of mining rights.

Classification and Rates in 1908. Mining properties were divided into two grand groups,—operating mines and prospects. The operating mines were classed in five groups, as follows:⁵⁴

Class I. (a) Properties where mining was comparatively inexpensive and the ore high grade.

(b) Properties where mining was comparatively easy and the ore of lower grade.

Class II. Properties where mining was somewhat more difficult and the mining cost greater than in the case of Class I, and the ore of mixed grade.

Class III. Underground properties where the expense of mining was comparatively low for that kind of mining and the ore of high grade.

Class IV. Underground or milling-pit properties of distinctly second grade, determined by a higher cost of mining and lower grade of ore than in the case of Class III.

Class V. Mines of inferior character where expenses of operated were high.

Prospects were divided into four classes or groups, as follows:

Class I. Lands that had been drilled and test-pitted, and where stripping of the overburden had been carried on. In other words, where the property was about to become a mine.

Class II. Lands that had been drilled and test-pitted and ore found in some abundance.

Class III. Unexplored lands near good mining properties.

Class IV. Lands that had not been explored but were in the well known ore-belt.

The rates of valuation per ton in the ground were fixed as shown in Table No. 4.

⁵³Minnesota Tax Commission, *First Biennial Report*, 1908, p. 119.

⁵⁴*Ibid.*, p. 120.

TABLE NO. 4.

MINNESOTA IRON ORE RATES IN 1908.

	Class I	Class II	Class III	Class IV	Class V
Operating mines (a).....	33c	27c	23c	19c	14c
“ “ (b).....	30c				
Prospects.....	15c	10c	8c	\$3 to \$50 per acre	

“In the determination of the rates, the Commission was confronted by a number of serious problems,—how to get a taxable valuation of iron properties that would be fair to the state and to the owners of the properties. The rates arrived at were in the main determined by several factors:

(1) The difference between the cost of mining and the average price of iron ore during the preceding three years.

(2) By the present worth of the difference for a period of twenty years on a basis of four percent rate of interest.

(3) By the percentage of the assessed valuation of real property in the state to the full value of such property.

The classes referred to and the rates established for them were determined as far as possible by the differences between mines in cost of operation, difficulty of mining, and grade of ore.

No better method of valuation was suggested at the hearing of mine owners, and it was the best that the commission could do under the ad valorem requirements of the law.”⁵⁵

The report of the commission shows that there was a disposition on the part of the mining companies to give all help that would lead to a fair valuation.

During subsequent years some improved methods have been used. The Second Biennial Report of the Commission gives further details,⁵⁶ describing how the estimate of tonnage was made and how the ore was graded.

Prior to 1909, the classification of iron ore and the tonnage estimates were based largely on blue prints of explorations furnished by owners, lessees, or operators of the various properties. It was deemed advisable to have the exploration, computations, and estimates verified by disinterested and competent engineers. In June, 1909, the faculty of the Mining Department of the

⁵⁵*Ibid.*, p. 122.

⁵⁶*Second Biennial Report*, 1910, p. 56. See also *Third Biennial Report*, 1912, p. 65.

University of Minnesota entered upon this work for the Tax Commission and has continued the work to date.

Classification and Rates in 1909. In 1909 a rearrangement of classes was made, the various mineral properties being classified as active mines, reserves, and sub-reserves.⁵⁷ Reserves are described as mineral properties that have been drilled and tested, and upon which measurable tonnages of merchantable ore are known to exist but have not been developed, because of remoteness from or lack of transportation facilities, market conditions, or other causes that would render the present operation unprofitable. Sub-reserves are a secondary class of reserves and are valued at a lower rate than either of the other classes.⁵⁸

The classes and rates in 1909 are shown in Table No. 5.

TABLE No. 5.
MINNESOTA IRON ORE RATES IN 1909.

	Active mines cents	Reserves cents	Sub- reserves cents
Class 1.....	33	21	15
Class 2.....	30	18	10
Class 3.....	27	15	.....
Class 4.....	23	11	.....
Class 5.....	19	10	.....
Class 6.....	14	8	.....

The only change made in the active mines in the new classification was in the class number, 1-b being eliminated, and the classes numbered from 1 to 6 consecutively. Considerable change, however, was made in the reserve classes, five new classes being added and a substantial increase in rates made in two other classes. It was felt that certain reserves adjacent to active

⁵⁷*Second Biennial Report*, 1910, p. 80. "In addition to reserves there is a class of unexplored lands that from surrounding deposits and other circumstances justify the belief that they contain merchantable ore. In such cases the assessed value is usually placed at a much higher figure than adjoining lands that are known to be outside of the mineral belt, or on lands that have been drilled and no merchantable ore found on them."—*Ibid.*, p. 85.

⁵⁸*Third Biennial Report*, 1912, p. 85.

mines and shortly to become shipping mines should take a higher rate than the one first imposed by the commission.⁵⁹

After the work of re-classification had been completed in 1910 and new tonnages and reserves had been added to the assessment rolls, the commission made a general increase of 5 percent on all mines, reserves, and other lands in the ore belt. The rates after this increase had been applied are given in Table No. 6.

TABLE NO. 6.
MINNESOTA IRON ORE RATES IN 1910.

	Active mines cents	Reserves cents	Sub- reserves cents
Class 1.....	34.65	22.05	15.75
Class 2.....	31.50	18.90	10.50
Class 3.....	28.35	15.75	
Class 4.....	24.15	11.55	
Class 5.....	19.95	10.50	
Class 6.....	14.70	8.40	

Rates in 1911 and 1912. The tonnage rates in 1911 were the same as in 1910 for the same classes. In 1912 a general increase of 5 percent was made. The 1912 rates are given in Table No. 7.

Classification and Rates in 1914. The standard classification employed in 1914, as given in the Tax Commission Report for 1914,⁶¹ follows:

Active Mine Tonnage

Class

1. Open pit, low mining cost, high grade ore.
2. Open pit, moderate mining cost, medium grade ore.
3. Open pit, high mining cost, mixed grade ore.
4. Underground, low mining cost, high grade ore.

⁵⁹*Ibid.*, p. 80.

⁶⁰Applied to shipping mines, Itasca county.

⁶¹*Fourth Biennial Report*, chap. VI and VII.

5. Underground, moderate mining cost, medium grade ore.
6. Underground, high mining cost, excess rock and water, mixed grade ore.

Reserve Tonnage

Class

1. Undeveloped reserve ore of active mines, class 1.
2. Undeveloped reserve ore of active mines, class 2.
3. Undeveloped reserve ore of active mines, class 3.
4. Partially developed and stripped, high grade ore.
5. Partially developed, not stripped, medium grade ore.
6. Partially developed not stripped, mixed grade ore.

TABLE NO. 7.

MINNESOTA IRON ORE RATES IN 1912.

	Active mines cents	Reserves cents	Sub- reserves cents
Class 1.....	36.3825	23.1525	16.5375
Class 2.....	33.0750	19.8450	11.0250
Class 3.....	29.7675	16.5375	.....
Class 4.....	25.3575	12.1275	.....
Class 5.....	20.9475	11.0250	.....
Class 6 ⁶⁰	16.5375	8.82	.....
Class 7.....	15.4350	.....	.....
Class 8.....	14.70	.....	.....

In 1907 classes 3, 5, and 6 were numbered 1, 2, and 3 and corresponded with standards described in classes 4, 5, and 6. Class 3 is also a sub-reserve rate for class 1 and for active mines of wash ore. Class 5 is also a sub-reserve rate for class 3.

General rate increases of 5 percent have been made in 1910, 1912, and 1914. These represent a total increase over the 1907 valuation of 15.75 percent.

The assessed rates per ton which have been used since the appraisal has been made by the Tax Commission have been as shown in Table 8.

TABLE No. 8.
CLASSIFIED ASSESSED RATES PER TON.

Class	Rates per ton 1907-1908		Rates per ton 1909		Rates per ton 1910-1911		Rates per ton 1912-1913		Rates per ton 1914	
	Mine cents	Reserve cents	Mine cents	Reserve cents	Mine cents	Reserve cents	Mine cents	Reserve cents	Mine cents	Reserve cents
1.....	33	15	33	21	34.65	22.05	36.38	23.15	38.20	24.31
2.....	30	10	30	18	31.50	18.90	33.08	19.85	34.73	20.84
3.....	27	8	27	15	28.35	15.75	29.77	16.54	31.26	17.36
4.....	23	.....	23	11	24.15	11.55	25.36	12.13	26.63	12.73
5.....	19	.....	19	10	19.95	10.50	20.95	11.03	21.99	11.58
6.....	14	.....	14	8	14.70	8.40	15.44	8.82	16.21	9.26

This classification is adjusted so that proper allowances can be made for the following conditions:

The classification provides automatic rate adjustments to meet: (1) the greater value of the better grades, and the shorter periods of discount for active mine ore exhaustion, or both; (2) the various grades and the longer periods of discount for the reserves of active mines and of all other reserves; (3) the proper rate to apply, as a reserve passes into the active or operating mine class.

The effect of this method of valuation is exhibited by the data in Table No. 9.

TABLE No. 9.
ASSESSED VALUE OF PROPERTY IN MINNESOTA.

	1906		1912	
	Assessed value	Percent total	Assessed value	Percent total
All real property	\$ 751,887,611			
Acre property	392,979,128	52.27	\$ 492,172,962	42.78
City and village property	294,422,074	39.16	398,802,305	34.67
Mineral property	64,486,409	8.57	259,418,277	22.55

Factors in Present Valuation. The essential and controlling features of this method of valuation seem to be based upon the following:

1. Gross tonnage of ore in the state.
2. Total annual output.
3. Average rate of exhaustion.
4. Classification of mines and reserves, according to quality of ore, marketability, present cost of mining, and average profit per ton.
5. On the basis that money is worth 4 percent and that the average period of exhaustion for all the mines of the state would be 20 years, the present worth of the ore was determined for each class.
6. Upon this base equalization has been effected, first, between individual mines, on account of any important local

conditions which were not made factors in the classifications; and later between the mines and other property.

According to the laws now in force property is assessed as follows:

Class I. Iron ore whether mined or unmined shall constitute class one (1) and shall be valued and assessed at fifty (50) percent of its true and full value. If unmined, it shall be assessed with and as a part of the real estate in which it is located, but at the rate aforesaid. The real estate in which iron ore is located, other than the ore, shall be classified and assessed in accordance with the provisions of classes three (3) and four (4) as the case may be. In assessing any tract or lot of real estate in which iron ore is known to exist the assessable value of the ore exclusive of the land in which it is located, and the assessable value of the land exclusive of the ore shall be determined and set down separately and the aggregate of the two shall be assessed against the tract or lot. *Minnesota Laws of 1913*, chap. 483.

Class II. Household goods shall be valued and assessed at 25 percent of the full and true value.

Class III. Live stock, stocks of merchandise, tools, machinery, and all unplatted real estate, except as provided in Class I, shall be valued and assessed at thirty-three and one-third percent of the true and full value thereof.

Class IV. All property not included in the three preceding classes shall be valued and assessed at forty percent of the full and true value.

The reason given for appraising mined and unmined ore at 50 cents on the dollar while other property is valued at a lower rate is that property in general continues the object of taxation, but mines and the ores they produce are taxed for a relatively short time.⁶² By some it is claimed that this is practically a method of taxing unearned increment, or what might be called a "natural increment".

The legislature of 1905 enacted the following law:

⁶²There is, therefore, a question whether taxes are levied, as claimed, simply upon profits; apparently there is an effort made to take for the state a share in the proceeds of the ore. The ultimate effect of such practice will undoubtedly be to reduce the value, to the mine operator and land owner, of ore in the ground, on account of this increased expenditure for taxes.

“That whenever any mineral, gas, coal, oil, or other similar interests in real estate are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, such mineral, gas, coal, oil, or other similar interests may be assessed and taxed separately from such surface rights and interests in said real estate, and may be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes.”⁶³

Owing to the decisions of the courts in *Washburn v. Gregory Company*,⁶⁴ it is recommended by the Tax Commission⁶⁵ that the legislature change the present law in the preceding paragraph, and “provide that an assessment on any land by its ordinary description shall be deemed to cover all mineral reservations. If the legislature should deem it wise to change the law as above indicated it should also make a provision that in case the owner of the surface or the owner of the mineral rights asked to have them separately assessed his request should be complied with.”

Engineering Field Work. The appraisal as carried on at present through the Mining Department of the University of Minnesota meets with the hearty co-operation of the mining companies and the complete records of prospecting and development, as well as data on costs, analysis, and prices of ore are available for the use of the engineers of the Tax Commission. The drill records and other data of ore development are checked as far as possible and the tonnages are determined by the engineers. Properties are inspected from time to time and as frequently as developments of new ore-bodies and exhaustion of old ones indicate important changes in a mine. The tonnages are classified and the mining companies have an opportunity to file a protest against both the tonnage and the classification.⁶⁶ The rate for each class is determined by the Tax Commission and each mine is then appraised at half the amount resulting from adding together the value of the ore in each class figured at the rates for that class.⁶⁷

⁶³*General Statutes*, 1913, sec. 1973.

⁶⁴125 Minn. 491.

⁶⁵*Fourth Biennial Report*, 1914, p. 152.

⁶⁶In 1914 there were but eleven applications for reduction in the assessment of mineral properties and these were all of minor importance. (*Ibid.*, p. 84).

⁶⁷The rates have been increased 5 percent three times since the first appraisal; this represents a total increase of 15 3/4 per cent over the

Cost of Appraisal. The cost of the appraisal by the engineers is comparatively small when the gross value of the properties appraised is considered. At the present time the engineers are not making any analyses of ores as there is sufficient checking of analyses at the mine, at the docks, and at the iron furnaces. The engineers do not investigate titles as this is done by other employees of the commission. The entire expense of the engineering work together with a pro rata share of the entire expense of the Tax Commission is approximately \$14,000. The assessed valuation of the iron ore of the state in 1913 was \$256,676,686 and the total taxes paid by the mining companies amounted to \$6,258,291. This represents an expenditure of \$.0000545 per \$1000 appraised and \$.00224 per \$1000 of taxes collected.

Michigan

FINLAY APPRAISAL. For a number of years following 1891, the year in which the tonnage tax was repealed, there was considerable dissatisfaction on the part of tax-payers, particularly the owners of farm lands, with the results of the assessment of the mineral properties in Michigan.⁶⁸ The work done in Minnesota in appraising the iron ore mines and lands attracted attention and in 1911 the Michigan legislature instructed the State Tax Commission to secure competent technical assistance and make a complete appraisal of all the mines of the state. The time allotted for doing the work was short but a comprehensive report was submitted which laid the foundation for a systematic procedure for appraising the mines of the state. In Minnesota there were only iron mines to appraise, while in Michigan there were iron, copper, coal, salt, and gypsum mines as well as quarries. These latter, however, the appraiser did not consider advisable to classify as "mines" and limited his

1907 valuation. The instructions now are that mining property shall be valued at 50 cents on the dollar. Formerly it was estimated that property was appraised at 43 cents on the dollar; a 15 3/4 percent increase on this basis would mean 6.77 cents which would raise the basis for mines to 49.77 cents on the dollar. It is evident that the new law will make little change in the results of the appraisal of mines.

⁶⁸The following data will illustrate the reason for this dissatisfaction:

A mine was listed by the assessors, on 1/3 valuation	\$ 50,000.00
Cash paid in by stockholders	1,200,000.00
Company's estimate of real estate, plant, equipment	807,334.95
Market value of stock	300,000.00
Gross earnings for year	178,727.53

report to the copper, iron, and coal mines. As the mines that were appraised included some types distinct from those valued by the Minnesota Tax Commission, the appraiser's report will be considered in some detail. The appraiser endeavored to determine the "value of the mines to the permanent owner for the production of minerals"⁶⁹ and did not consider the market value of the stock of companies, insisting that speculative value should not enter into a conservative appraisal.

Factors in Valuation. The valuation was based on three factors,—average cost of production, average prices, and an estimate of the future period of production. Average costs of product and average prices of product were determined by experience but the trend of future prices was considered. "The life of the mine is based partly on developed ore and partly upon an assumption of continuance of known ore bodies beyond the present bottom levels of the mines. The assumption of continuance is based mainly upon the extent to which the continuity of the deposits has been proved for the district and for the type to which the mine belongs. The future value of a series of dividends is reduced to a present value by the annuity method; that is, a sum is calculated upon which the series of dividends shall pay 5 percent interest and also provide each year a sinking-fund installment which, invested each year at 4 percent interest, and added to prior installments similarly invested and reinvested, will equal the sum taken. This sum is the amount which an investor can afford to pay for the property." On this basis no present value was given to unprofitable mines. Likewise unproductive property could not be assessed on this basis.

In appraising the copper mines, the market value of mining stock was not considered nor the equipment of the mines, but simply the earning power and the life of each mine. In order to determine the value of the mines, the data of costs and production for five years were collected together with the prospective tonnage and content of rock from unmined areas.⁷⁰ Only nine copper mining companies paid dividends from 1905 to 1910; the record of twelve mines was such that they could be

⁶⁹Finlay, J. R. *Appraisal of Mining Properties of Michigan*. p. 10.

⁷⁰From the production to date, an estimate for such mine was made to determine the output of mineral per acre. Allowing a factor for decrease in value with depth, the probable output from the unmined areas was determined.

classed as probably profitable in the future. All of the other mines were appraised at zero on account of their records of cost of production. Attempts to determine an acreage value for unproductive mines and undeveloped lands were not successful. According to the appraiser it seemed "ridiculous to place a valuation upon lands which have no showing at all when costly operations upon lands that have considerable showings of copper have not proved those showings to have any value, but, on the contrary, in most cases have proved them not to have any value."⁷¹

Mr. Finlay discussed at some length the value of iron ore, the possible effect upon Michigan iron-mining of foreign competition, and the effect of taking off the tariff on manufactured iron and steel. He concluded that "the iron ore market will continue in the future on substantially the same course it has pursued in the past; that the demand is sure to increase, and that prices are more likely to be higher than they are to be lower than the average of the past seven years."⁷² Attention was called to the fact that many iron mines operate upon leased lands and pay a royalty per ton of iron ore mined. Such royalties may be considered from the viewpoint of the mining operator as an expense; from the viewpoint of the state they represent a net profit of the iron mining business.

On the basis of iron ore reserves and records of costs and profits, it was estimated that productions and earnings could be continued on the iron ranges on the same basis for sixteen years, and probably a longer period. The estimates of ore reserves were based on (a) ore found in drill-holes, (b) ore reported by companies as being in sight above the bottom levels of the mines, and (c) an additional amount of ore added on the judgment of the appraisers based upon the conditions on the bottom levels. In some of the districts extensive drilling made it possible to estimate the extent of the ore-bodies with sufficient accuracy for such an appraisal. The following paragraph from the discussion of the valuation of the Menominee Range indicates the manner in which generalizations as to the continuity of the ore-bodies of the districts were made.

⁷¹*Ibid.*, p. 32.

⁷²*Ibid.*, p. 37.

“The total amount of ore accounted for above the 1,160 foot level is 50,645,807 tons. This means that the average horizontal area of the ore-bodies has been in the past approximately 440,000 square feet. If we assume that this area is normal for the 580 foot level and that for the 1,160 foot level the area is only 263,000 square feet, we get a diminution of approximately 180,000 square feet in 600 feet. This means that each additional 100 feet in depth means a diminution of area of 30,000 square feet. On this basis we might assume that the ore would vanish at a depth of 1,900 feet. This assumption would leave us below the present bottoms approximately 9,000,000 tons.”⁷³ “A continuation of life (of a mine at the assumed rate of production) beyond 20 years adds to the present value very slowly, and wherever the ore supply is sufficient to maintain output for even 15 years, it is not worth while to be critical about the amount of addition that might be made.”⁷⁴

The problem of determining the length of the period from which average operating costs and average market prices shall be determined has aroused considerable discussion. In Great Britain this has been fixed by law.⁷⁵

Mines which are being exhausted rapidly and whose output and value are declining rapidly would obviously benefit by being assessed on a three-years' average. One effect of the five-years' average period is that Mr. Finlay determined the average price of copper for the period of twenty years and found that

⁷³*Ibid.*, p. 51.

⁷⁴*Ibid.*, p. 57.

⁷⁵The Income Tax Act of 1842 specified that collieries, in common with other mines, shall be assessed on the full gain of one year, or an average of the five preceding years, but if, from some unavoidable cause, any mine has been decreased and is decreasing in the annual value, so that a five-years' average will not give a fair and just estimate of the annual value, such annual value can be computed on the actual amount of profits for the preceding year, subject to the usual abatement, on account of diminution of duty within the current year; and if any mine shall have wholly failed, the assessment can be wholly discharged. (*Transactions of Institute of Mining Engineers*, 1914, XXIX, 93).

By the Act of 1866, mines were transferred to the schedule for property assessed on the three years' average. Quarries were transferred from the class of property assessed on a one-year basis to the class on the three-year basis. However, mines are generally appraised on the average of five years' returns.

there has been a gradual increase in the price. He also considered the average over ten-year periods and came to the conclusion that the trend was upward. The average for the last ten-year period was 14.702 cents per pound, and he used 14 cents as the average price in his valuation. For most of the mines the average cost was figured on a five-year basis.

In estimating the price of iron ore, the average quotations for standard ores for a period of seven years were taken; this average, however, differed but little from the average for five years. In determining the probable cost of mining iron ore the average cost for the period of five years preceding was taken and allowance made for any expected increase or decrease in operating expenses. To illustrate the method of calculation used in determining the present value of the iron mines the following summary of data (Table No. 10) for the five-year period for District I is given.⁷⁶ Similar data were compiled for the other districts.

As a result of the Finlay appraisal there followed considerable discussion and many protests were made by the iron mining interests. The officers of the Michigan Tax Commission arranged for hearings of the complaints of the mining interests and a number of changes were made in the valuations of the appraiser before they were placed upon the assessor's lists.⁷⁷

MICHIGAN SYSTEM OF APPRAISAL. Since 1911, the Tax Commission has had technical assistance in appraising the iron mines and, beginning with 1913, the State Geologist has been Mine Appraiser for the Tax Commission.

In order to show the essential characteristics of the methods at present in use by the Michigan Geological Survey, it may not be inappropriate to point out specifically the points in which departures have been made from the Finlay appraisal of 1911.

(1) The Finlay method followed more or less rigid rules while the present method is comparatively elastic.

(2) The interest rate now used is 6 percent on both capital and redemption fund, while Mr. Finlay used 5 and 4 percent respectively.

⁷⁶Finlay, *op. cit.*, p. 61.

⁷⁷Mr. Finlay valued the iron mines of the four counties at \$119,485,000; the supervisors had appraised the same mines at \$19,623,508; the Tax Commission adopted the figures \$85,567,500. Mr. Finlay's figures for the copper mines were not placed on the tax roll in any of the counties.

TABLE NO. 10.
DISTRICT NO. 1.
GOGEBIC COUNTY, MICHIGAN.

	Totals	Per ton
Number of mines and explorations reported	20	
Wages and salaries paid.....	\$16,632,296.40	
General expenses (not including taxes).....	\$ 1,558,705.93	\$.098
Construction, development and explorations.....	4,083,864.20	.260
Mining expense.....	21,207,105.10	1.355
Total cost at mine.....	\$26,849,675.23	1.72
Rail freights paid.....	6,002,288.37	.40
Lake freights paid.....	10,585,921.64	.71
Commissions paid.....	695,520.57	.046
Total expense.....	\$44,133,405.81	2.876 ⁷⁸
Total tons sold.....	15,183,842	F. O. B.
Total tons shipped.....	15,393,642	Cleveland
Total tons mined.....	15,711,053	
Receipts from sale of ore.....	65,694,536.07	
Total operating profit of 12 mines.....	21,944,683.57	
Taxes.....	992,272.42	
Proportion taxes to operating profits (%).....	4.55	
Royalties.....	5,960,403.65	
Profit to companies (12 mines).....	15,212,854.39	
Total profits 12 mines including royalties.....	20,957,419.53	
Total loss to three mines (Exploration and development properties not included).....	678,579.85	
Total tonnage reported in sight.....	17,354,100	
Tons added by appraiser.....	25,645,900	
Total tonnage expected.....	43,000,000	
Average yearly value (expected) per ton.....	\$ 4.22	
Average cost per ton expected F. O. B. Cleve- land.....	2.87 ⁷⁹	
Average profit per ton expected.....	1.35	
Annual tonnage expected.....	2,875,000	
Present value of mines.....	\$41,560,000.00	

⁷⁸The average cost per ton includes mines worked at a loss.

⁷⁹The expected cost per ton is only for mines expected to work at a profit.

(3) At present in the valuation of undeveloped or unproductive mines when earnings will be deferred, proper allowance is made.

(4) The Finlay valuation did not include ore in stock piles. At present such ore is included in the valuation.

(5) Mr. Finlay did not appraise unprofitable operating properties. These are now valued according to the judgment of the appraiser because the mine is supposed to be worth something or otherwise it would not be operated.

(6) Mr. Finlay appraised for taxation on the basis of value to the owner. The present method attempts to determine the value on the market.

(7) With the higher rate of interest now used, hazard rates or "cuts" are applied to the various factors according to the judgment of the appraiser. These hazards vary with the mine. This has been found preferable to a sliding scale of interest.

(8) Mr. Finlay figured on future prices of the product. The present Michigan method is based on the prices and profits for an average of the last five years. Mining costs are figured in about the same manner.

Capital Account. Capital account is not allowed in the cost sheets of the mining companies as the appraiser considers this in a uniform manner in valuing all the mines. Taxes are allowed as an item of cost but royalties are not allowed.

Stock Piles. Mined and unmined ore are now treated practically alike, although the mined ore is classed as personalty. The rate on real estate and personal property is the same so it is immaterial to the mining company whether the ore is taxed in the stock pile or in the mine provided it is not subjected to double taxation. On December 31, the total amount of ore in the mines and on the stock pile is determined. On April 2 following, a report of the ore in the stock pile is filed and any increase in the tonnage reported stocked April 2, as compared with the tonnage of December 31, is deducted from the tonnage in the mine December 31, so that the mine is taxed on the total tonnage of December 31.

Inspection. Mines are not classified or grouped except in a general way in counties or districts for the purpose of comparison and equalization when the properties are of the same

character. Mines are inspected annually. There were in all 132 valuations in 1914.⁸⁰

Copper mines. The copper mines were included in the Finlay valuation, but have not been appraised since. It is apparently the opinion of most of the interested parties that the copper mines have generally been entered upon the tax rolls at more than their present value. Local officials have requested the Tax Commission to appraise these mines and it seems probable that when the mines are operating under normal conditions a careful appraisal will be made. The Finlay appraisal returned the mines at \$69,000,000, but these figures were not used. In 1916 the mines were rated by the local assessors and boards at \$80,000,000. In general, the copper mines of the Lake Superior district have been appraised on the basis of the current market quotations of copper stocks. The equalization for 1914 was based on the stock quotations for April 13, 1914. Producing dividend-paying mines were valued at 80.5 percent of the stock valuation; producing but non-dividend-paying mines, at 67 percent; non-producing and non-dividend-paying mines at 53.6 percent. It was found that the dividend-paying mines were returning on an average 7.31 percent in the market value of the stock.

For 1916 the valuation was based upon the average stock quotation throughout the year. The closing bid price every Monday was used in determining the average for the year ending the second Tuesday in April, 1916. For the year mentioned the producing dividend-paying mines were appraised at 66 percent of the average quotation, the producing non-dividend-paying mines at 55 percent, and the non-producing properties at 44 percent.

Coal and Other Mines. At the present time the appraiser of mines does not place a value upon the coal mines, salt plants, and other mineral properties. The figures submitted by the appraiser in 1911 for the coal mines have not been placed upon the tax roll. The practice of the local assessors is to value the plant, but generally the coal rights are not assessed.

Mineral Lands and Prospects. Mineral lands are no longer classified and valued by the commission as it has been found impractical to apply the classification from year to year to lands whose mineral content is merely speculative. The prob-

⁸⁰There were no protests by any mining company against the valuations for 1914.

lem is left in the hands of the local officials and the State Tax Commission intervenes only on request and in specified instances when protests are made by owners of speculative mineral lands against valuations made by local assessors and boards of review.

Plant. Surface plant and improvements used exclusively for mining purposes are not taxed as in this system of valuation no value is attached to them. Only those improvements which are directly connected with the mining operations are exempt; stores, houses, hospitals, etc., are taxed. A mine power-plant furnishing power only to the mine of the owner is not taxed. In the case of a mine power-plant located outside of the taxing district in which the mine is located, the power-plant is taxed as a power-plant where it is located, but the valuation of the mine in the other district is reduced by the amount at which the power-plant is valued. In this way the mine operator pays no more taxes than if the power-plant were located contiguous to the mine. A mine whose power-plant sells power is permitted to charge itself for power at the custom rate, but the power-plant is then taxed as if it were not owned by the mine.

Royalties. Royalties are not taxed except that they are included in profits and taxed to the operators.⁸¹

Local Assessments. The local taxing units in the iron mining districts use the valuation of the tax commission whenever such a valuation is made. When the local officials do not use the commission's valuation, the commission may ask for a review. In one instance this was done and the proper figures were thus insisted upon in spite of the apparent unwillingness of the local officials.

Cost of Appraisal. The expense of the annual appraisal of the iron mines of Michigan including the pro rata expense of administration of the Michigan Geological Survey is approximately eight thousand dollars. The valuation of these mines January 1, 1914, was \$92,090,349. In 1913 the valuation was \$82,534,221 and the mines paid taxes amounting to \$1,579,124.13. This makes the cost of appraisal \$0.005067 per \$1000 of taxes collected and \$0.000097 per \$1000 appraised. It should be noted that this is the cost of appraisal of individual mines which are inspected annually.

⁸¹According to the Michigan laws of 1891 all annuities and royalties are taxed as personal property. (*Laws of Michigan*, 1891, Act No. 200).

Wisconsin

Profiting by the experience of Minnesota and Michigan, Wisconsin, acting through the Tax Commission, has provided for the appraisal of the mineral properties of the State by the State Geological Survey. As previously noted two widely different types of properties are being operated, namely, the iron mines and the zinc mines.

IRON MINES. The iron mines produce only two percent of the Lake Superior iron ore, so that the task of appraising the iron mines is a small one when compared with the work in Minnesota and Michigan. There are five operating iron mines on the Gogebic Range, three on the Menominee, two on the Baraboo, and two at Mayville. The first state appraisal of mines for taxation was made in 1912, the methods employed being somewhat similar to those in use in Michigan. Owing to the small number of operating iron mines no classification has been employed as each mine is appraised as nearly as possible upon its present value.

At first in estimating the value of a mine on the basis of earnings and life, the interest rate was taken at 5 percent; it is now taken at 6 percent. The sinking-fund is figured on a 4 percent basis. The various hazards of mining are considered and deductions of from 10 to 15 percent may be made if conditions justify. The Wisconsin Tax Commission in 1912 decided that mine royalties are taxable as income after allowance is made for depreciation. Mine owners claimed that royalties were a depletion of the original capital.

In general, except at Mayville and in the zinc district the effect of the appraisal by the Geological Survey has been to increase the valuation of the mines. In one instance the assessed valuation was increased from \$45,000 to \$1,500,000. The local assessors and the boards of review have generally accepted the valuation of the Geological Survey. One exception has been conspicuous; the valuation of an iron mine was reduced by the Board of Review from \$300,000 to \$75,000.

ZINC MINES. The zinc mines of the Platteville district presented a number of problems which had not arisen in the appraisals in Michigan and Minnesota. The Wisconsin Geological Survey made a careful study of conditions in the Platteville district and a comprehensive report on "Method of Mine Valuation and Assessment" with special reference to the zinc mines

of southwestern Wisconsin was prepared by Mr. W. L. Uglow.⁸²

Part I of this report discusses carefully the conditions in the Platteville district which have an important influence upon mining costs, operating profits, and the value of mining property. Owing to the type and the extent of the ore deposits, the life of the individual mine is generally short and the methods of valuation developed in the iron-mining districts cannot be applied justly without the introduction of many factors for variations from the assumed standard conditions.

It was found that prior to 1913, as a general rule, little increase in assessment had been placed upon lands on account of the mineral contained. The common practice in the district has been for the mining operator to own simply a lease, and the leasing company often did not undertake to pay any taxes with the exception of those on income and personal property.

Estimating Ore Bodies. In estimating the value of a drilled ore body, it is customary for experienced operators to compute, from a map showing the location of the drill holes, the actual area underlaid with ore and to determine the total tonnage of ore that may be expected from the records of the drilling. In computing the value of the product of the mining and milling operations, the market price of various proportions of the zinc, lead, and iron minerals must be considered carefully. In spite of the painstaking work of competent engineers, the statement is made that, "sufficient mining has not been done in the district on well-drilled ore bodies to admit of a reliable set of average factors for mill recoveries, etc. It is doubtful if such a set of average factors will ever be derived."⁸³

However, mines and mineral lands are bought and sold on the basis of drilling and it is logical to conclude that appraisal for taxation can be made upon the same data with a degree of accuracy that will approximate that of the engineer upon whose estimates the valuations for sale and purchase are made.

In order to demonstrate the results of appraising zinc mines upon different bases, Mr. Uglow assumed a "hypothetical zinc mine." The assumptions were based upon the actual records of eight operating mines. The hypothetical mine was assumed to have a definite tonnage of ore available which will be worked out in four years. Upon the basis of the operating costs and

⁸²Bulletin XLI, *Wisconsin Geological and Natural History Survey*, Madison, 1914.

⁸³*Ibid.*, p. 16.

profits of mines in the district, the profits of the hypothetical mine were determined for each year of operation. Upon these data Mr. Uglow determined the assessed value of the hypothetical mine under the (1) ad valorem method, (2) the Arizona method, (3) the Colorado method, and (4) the equated income method.⁸⁴

Wisconsin Method for Zinc Mines. The actual method of appraisal⁸⁵ employed in 1914 in the Platteville district was a modification of the method used by Mr. J. R. Finlay in appraising the mines of Michigan in 1911. The most important changes were as follows:⁸⁶

1. "In properties with a considerable tonnage of ore drilled out and assayed, it was found advisable to base estimates of future grades of ore on this drill-hole information, viewed of course in the light of past production; and not to lay too much stress on the grades of ore produced in the past.

2. In the smaller properties which have very little probable ore in sight (and consequently an estimated short life) and no drillings in advance of the workings, the forecast of future production was based almost entirely on the production of the past year or fraction thereof, almost regardless of the grades of ore produced previous to that time.

3. It was assumed (in the absence of information to the contrary) that each ore body extended 200 feet in advance of each ore breast or the last drill holes in ore, with present dimensions.

4. The average price of spelter was assumed to be \$5.15 per cwt. The average price to be expected for ore of any grade for purposes of this calculation, was based partly on this spelter market, and partly on the average of a series of ore prices obtained from several operators and ore buyers of the district.

5. The cost per ton of dirt used in the calculation was based in a general way on the average cost obtained from the past records of each individual mine. The appraiser, however, did not hesitate to use a higher or lower figure, if, in his judgment, this was demanded by conditions liable to be met with in the near future. This variation became of

⁸⁴A description of the proposed equated income method will be found in Chapter VI, p. 151, and Chapter IX, p. 243.

⁸⁵Uglow, *op. cit.* p. 38.

⁸⁶*Ibid.*, pp. 38, 39.

considerable importance in the case of mines with a probable life of a year or less.

6. On account of the difficulty of estimating future probable profits in the form of an annuity, and on account of the short lives of the mines, the table of strict present values given by Hurd's Manual was used instead of the Finlay table.

7. A six percent rate of interest was used.

8. Reductions varying from 10 to 15 percent were made from the valuations thereby obtained. The figure used in each case depended on the judgment of the appraiser as to the probable extent of unforeseen risk."

Mining properties were divided into four classes for the purpose of valuation:

- (1) Operating mines, which were making a profit or were likely to make a profit on a \$5.15 spelter market.
- (2) Mines closed down, but which have ore reserves not likely to be worked at a profit on a \$5.15 spelter market.
- (3) Prospects with sufficient tonnage of ore drilled to warrant the undertaking of mining operations.
- (4) Prospects with small ore bodies drilled, but not sufficiently large at the time of assessment to insure the profitable undertaking of mining operations.

Valuations were placed on classes (1) and (3) but not on (2) and (4).⁸⁷

A number of objections to this method of valuation have been raised but none, in addition to those previously mentioned, has been offered by Wisconsin operators except the claim that prices of zinc ore and spelter fluctuate more than the prices of iron ore and copper. An investigation showed that this claim is not warranted by statistics.

The system "implies the necessity of predicting reserve tonnage, annual production, grades of ore, costs of mining, and future ore prices. The importance of these difficulties in southwestern Wisconsin can hardly be exaggerated."⁸⁸

Cost of Appraisal. The only estimate of the expenses of appraising the mines has been approximate owing to the small number of mines and the fact that the appraisers have been engaged simultaneously upon other work. The best estimate is that the total expense does not exceed \$1500 per annum.

⁸⁷*Ibid.*, p. 40.

⁸⁸*Ibid.*, p. 68.

Arizona

The Arizona Tax Commission faced the task of formulating a plan for the appraisal of metal mines producing copper, gold, silver, lead, and zinc. As previously noted the mines are now taxed upon the same basis as other property, that is, under the general property tax.

"The method used comprehended a four-year average net (proceeds), based upon actual operations, a classification of the properties and capitalization at different factors according to the class.

Eight classes were made as follows:

- Class 1. Copper mines whose ore bodies are found in veins, fissures, and lenses, and do not show evidence of exhaustion.
- Class 2. Copper mines whose ore bodies consist of porphyry deposits and large acreages of contiguous ground largely unexplored and undeveloped.
- Class 3. Copper mines whose ore bodies consist of developed low-grade porphyry deposits.
- Class 4. Copper mines whose ore deposits show evidences of exhaustion.
- Class 5. Gold and silver mines whose ore deposits show evidences of exhaustion.
- Class 6. Gold and silver mines whose ore bodies have not shown evidence of exhaustion.
- Class 7. Zinc and lead mines.
- Class 8. All producing mines of irregular output.

In addition to these eight classes, three subdivisions were made: Subdivision 'A', which shall include all such properties as have entered the profitable productive stage during the year 1915; also so as to contain Subdivision 'B', which shall include all properties that have suspended profitable production during the period under consideration, for reasons other than market or physical conditions; also so as to contain Subdivision 'C', which shall include all such properties that have suspended profitable production when said properties could have been operated at a profit during the period under consideration.

The net earnings of classes 1, 2, and 3 were capitalized at 15 percent; classes 4, 6, and 7 at 20 percent; class 5 at 25 percent, and class 8 at 33 $\frac{1}{3}$ percent.

These capitalizing factors were considered sufficiently large to take into account all amortization, depreciation, and capital charges, and on this account no charges for these items were

allowed against the net. The average net of the past four years was used.

The total assessment of productive mines amounted to \$212,301,620.55, and was a raise of \$60,000,000.00 over 1915. Under the Colorado law it would have been about \$60,078,792.12. Under the law of New Mexico, Nevada, Utah, Idaho, and Montana it would have been about \$81,415,310.76.^{88a}

Other Western Ore Mining States

As previously noted,⁸⁹ a number of the western states have either levied a special tax upon production or output or have applied the general property tax rate to some arbitrary valuation of mines. This is in effect taxing mines upon a valuation which is assessed or determined by legislative enactment rather than by inspection or appraisal at true cost or market value. These programs of assessment usually include the appraisal of the improvements. In many instances the actual value of the so-called "improvement" is negligible. In the following discussion attention will be directed to the assessment of the mine itself and no further reference will be made specifically to improvements.

The special methods of assessment which have been employed recently in the mining districts under consideration include the following:

1. Gross output or gross proceeds.
2. Gross proceeds, less certain specified items of expense.
3. Gross proceeds and a percentage of the net proceeds.
4. A percentage of the gross plus a percentage of the net proceeds.
5. Net proceeds or a percentage of the net proceeds.

A comparison of the valuations that would be placed upon an operating property under each of the foregoing programs demonstrates how widely some of the programs are separated.

Mr. Uglow has shown for a hypothetical zinc mine how widely the appraisal under several programs would vary, as follows:

^{88a}Zander, C. M. Assessment of mining property in Arizona. *Bulletin of National Tax Association*, 1916, II, 20.

⁸⁹*Supra*, chap. VII, p. 156.

	Present value
Standard ad valorem method.....	\$250,000
Colorado method	360,000
Arizona method ⁹⁰	580,000
Equated income method, using actual annual profits...	350,000
“ “ “ “ average “ “	350,000 ^{90a}

The actual ratio existing between the assessed valuation and the gross production of the metalliferous mines is shown in Table No. 11, prepared by Mr. C. M. Zander.⁹¹

It is important to note that any system of appraisal which considers either gross or net proceeds, or both in any ratio, and which does not consider the life of the mine misses the mark entirely if the actual value of the property is the basis of comparison or the standard set. This statement is made under the assumption that the appraiser has simply the arbitrary directions of the law to guide him.

CALIFORNIA. In reporting to the County Assessors Association of California upon his procedure in appraising mines, Mr. C. E. Jarvis, County Assessor of Amador County, California, stated that he divided mining property into four classes, namely, mining locations, patented quartz claims undeveloped, valuable patented claims temporarily unworked, and producing quartz mines. He pointed out the difficulties of appraising and taxing unimproved and unpatented claims, suggesting that a law be enacted authorizing a uniform valuation of \$100 per claim. All patented quartz claims situated on the Mother Lode or main lode are valued at \$500 while claims on spur lodes are valued at \$250. The valuation of an idle property is based largely on the price asked for such a property by the owner. The valuation of producing mines is based in part upon the report of production and costs secured from the officers of the mine. If the mine is not profitable, the improvements are assessed at fifty percent of their cost, while upon the claim is placed a value that "will encourage further development." If the mine is earning a profit, the improvements are assessed at fifty percent of their cost. Stamp mills are assessed at \$500 per stamp. Other improvements are valued as carefully as possible. The mine itself

⁹⁰As employed in 1913.

^{90a}Uglove, *op cit.*, Plate X.

⁹¹Zander, C. M. Taxation of metalliferous mines. *Proceedings of National Tax Association*, 1914, VIII, 338.

TABLE NO. II.

1913 PRODUCTION AND 1914 ASSESSMENT OF METALLIFEROUS MINES.

Assessment includes non-producers. Lead and zinc taken from 1910 production.

State	Per cent of full value	Assessment	Assessment at full value	Gross production	Ratio of full assessed value to gross	Method of assessment
New Mexico	33 $\frac{1}{3}$	\$ 3,700,000	\$ 11,100,000	\$ 10,500,000	1	General property by local assessor.
California	50	26,526,000	53,052,000	26,526,000	2	General property by local assessor.
Nevada	45	6,000,000	13,333,000	34,481,682	2.5	Net earnings.
South Dakota	100	18,840,000	18,840,000	7,500,000	2	General property supervised by Tax Commission.
Colorado	100	41,455,055	(Inc. coal) 41,455,055	(Not inc. coal) 32,542,290	1 $\frac{1}{3}$	Combination of gross and net.
Idaho	40	8,089,000	20,225,000	18,767,553	1	Net earnings.
Utah	33 $\frac{1}{3}$	14,483,000	43,449,000	39,703,548	1	Net earnings.
Arizona	100	146,672,395	146,672,395	70,875,027	2	Combination of gross and net.
		\$ 265,765,440	\$ 348,126,450	\$ 240,896,100	1 $\frac{1}{2}$	

is rated at 125 percent of the earnings for the preceding year.⁹²

In 1912, California mines in the Mother Lode district were paying on the average approximately 7.5 percent of the gross receipts in taxes.⁹³

NEVADA. The experience of Nevada in dealing with the evasion of taxes by the mining companies handling the ore produced through subsidiary milling companies has already been cited. In this connection it is interesting to note that in 1913 the accounts of a large corporation show that the net earnings from the mine amounted to \$332,055.81 while the subsidiary milling company reported net earnings of \$1,118,603.97. The gross value of the ore shipped to the mill was \$3,144,173.11. An agreement has been made by the Nevada Tax Commission and the mining companies so that proper charges are now made for milling.

West Virginia

The assessing of mineral properties in West Virginia has developed many interesting points particularly in connection with royalties, leaseholds, and oil and gas properties.

Assessors are instructed in appraising mineral rights as follows:

“In assessing coal, oil, gas and other lands of similar character, you should constantly bear in mind that the fee simple, or what is commonly known as the ‘royalty interest,’ is assessable upon the land books as a part of the body of the land, while the ‘working interest’ or that interest in such land operated by the ‘lessee’ is assessed upon the personal property books under the head of ‘chattels real’ or ‘leaseholds’.

“The royalty interest in a well-settled producing well is worth in the market for commercial purposes \$1,250. for each barrel of oil produced every twenty-four hours; while the working interest is worth \$1000 for each barrel produced in twenty-four hours. That is, on a tract of land that produces 200 barrels of oil per day, the owner of the royalty interest of one-eighth the production receives 25 barrels of oil per day, and his interest would be worth \$31,250; while the owner of the working interest, who receives 175 barrels

⁹²Mr. Jarvis favors this method for mines generally, but suggests that other factors must be employed for other types of mines.

⁹³Jarvis, C. E. Assessment of mining properties. *Min. and Sci. Press*, 1912, CV, 210.

per day, could sell the same at \$100 for each barrel produced in twenty-four hours and his interest would be worth \$175,000. The difference between the value of the royalty interests and the working interest, based upon the production, is in favor of the royalty interest, the reason being that there is no expense attached to the production of the royalty interest; whereas, there is more or less expense attached to the working interest, in keeping up the wells. Thus, instead of valuing B's 100 acre tract of land, as per example hereinabove set out, at \$1,360. per acre, experience has shown that on account of the short life of such an investment, \$1,250. per barrel for every barrel received as royalty in twenty-four hours would be a fair market price for such interest, which would be for oil purposes alone, \$31,250. for the 100 acres of land, or \$312.50 per acre. B's 100 acre tract is certainly well worth, for oil purposes alone, \$312.50 per acre, when you consider that during the year he receives as royalty, according to the calculation above set out, the sum of \$136.87 per acre per annum. The working interest in said tract of 100 acres, according to this basis of valuation, would be worth, and would sell for upon the market, \$175,000. which interest, if the lease was for a term of years, not being a free-hold estate, would not be charged upon the land books but would be charged upon the personal property books.

"But suppose B instead of leasing his 100 acres for oil purposes and drawing a royalty, is the operator and is producing and receiving from his 100 acres, two hundred barrels per day, which two hundred barrels production is worth, and would sell for \$200,000., then would not his 100 acre tract for oil purpose alone be worth \$2,000. per acre? In other words if the oil wells on the one hundred acres, are producing two hundred barrels per day, not being encumbered by a leasehold, and could be sold in the open market for \$200,000., this tract of land for oil purposes alone would be worth the price of \$2,000. per acre."⁹⁴

It is suggested that for gas wells the annual royalty per well be capitalized at six percent and this amount be entered on the tax rolls.⁹⁵ But if the life of the gas wells in the community

⁹⁴*Instructions to Assessors*, West Virginia, 1910, pp. 8, 15, 16.

⁹⁵*Ibid.*, p. 19.

is short the rate should be increased in order to allow for the shorter life.

Kansas

In the Kansas coal fields the practice of assessing is practically as follows:

Where the fee to proved coal lands is entirely in one person, it is assessed at \$80 per acre. Mineral reserves owned in fee, separate from the surface ownership, are listed at \$60 per acre; mineral reserves worked out or not proved, \$10 per acre; mineral leases on proved coal land, \$40 per acre; when the surface owner has leased the coal, \$20 per acre is added to the surface value; farm land adjoining proved coal land is assessed \$5 in addition to the surface value.⁹⁶

Pennsylvania Anthracite Mines and Lands

The taxation of anthracite mines and lands has attracted much attention, particularly during the last ten years. Prior to 1890, the assessors in valuing anthracite lands returned appraisals of nominal values irrespective of the coal contents, or, if the land was valued on account of the coal the valuation was low. Following 1890 there was a demand among tax payers in the anthracite fields that the mining companies should bear a larger part of the tax burden. "An effort to adjust this more equitably evolved assessment by the foot-acre of coal in the ground—usually reported by the owner or operators, occasionally under oath, as an average thickness spread over the area of the lowest bid. The valuation placed on the foot-acre base, while irregular and frequently objectionable, was not, up to 1907, confiscatory, and the taxes assessed were paid without serious resistance. In 1907, stimulated by a renewed newspaper agitation, great advances were made in the assessed valuation, still on the foot-acre basis, and assessments of from \$60 to \$100 per foot-acre were imposed; these were resisted in the courts and are still (1915) in litigation, resulting in a condition of almost intolerable chaos. Despite court rulings reducing the assessments from \$40 to \$50 per foot-acre, the valuations have been continuously increased, until at the present time assessed valuations of from \$175 to \$300 per foot-acre are attempted to be imposed. In the tax appeal cases tried, sales have shown prices varying from two or three hundred up to ten thousand dollars per acre, the smaller values for lands containing only relatively

⁹⁶Correspondence, Kansas Tax Commission.

thin coal, or practically exhausted; medium values (from two to three thousand dollars per acre) for relatively small areas with normal coal contents, but unopened and generally not of sufficient area for separate operations; and extreme values, in a few cases, for going concerns, or for lands strategically located and thus having inflated values to particular purchases.⁹⁷

Mr. Norris considers the foot-acre method unfair to the mining operator because no allowance is made for lack of uniformity in the quality of coal and also for the greater cost of mining of thin beds as compared with thick beds. Valuations on the basis of royalties paid at the present time have failed to consider the fact that much of the coal will not be mined for years, and that royalty value is not the true present value for such coal.

In 1908 there were a large number of appeals made by the owners of coal properties on the valuations made by the assessors of coal districts in Northumberland County. These valuations had been adjusted by the Commissioners sitting as a Board of Review and when the County Court considered the appeals, it proposed that a Commission be appointed "to ascertain the actual cash value of the coal properties in the districts from which these appeals were taken, including the values of properties not appealed from as well as those appealed from, so as to enable the court to fix the cash value of properties appealed from, which is necessary, because values of coal properties are largely obtained by comparison with other property located in the district." There was no objection raised by the interested parties and the Court appointed a Commission of three to appraise the coal properties. The County Commissioners had reported a total assessment of \$11,130,557 for coal properties in the county. There had been nearly one hundred appeals.

The Commission, consisting of William Griffith, George E. Stevenson, and Samuel B. Morgan, was appointed on March 4, 1908 and submitted its report on May 29, 1909.

While the work of this Commission was limited to one county and to one type of mineral deposit, it is particularly interesting to mining engineers and tax officials on account of some of the conditions prevalent. Some of the coal tracts contained originally all of the sixteen or seventeen veins of coal known in the region. The character and thickness of coal, dip

⁹⁷Norris, R. V. The valuation of anthracite mines. *Proceedings of International Engineering Congress*, 1915.

and depth of beds, and other important factors affecting mining varied widely over the district. There had been "no sales of coal lands in Northumberland County, with the exception of one or two isolated cases, since 1872 or 1873. No sales since that time throw any light upon the value of the coal in place" and no evidence had been offered as to the holding price or asking price for coal lands since that date.

The Commission considered the experience of Luzerne and Lackawanna counties and the decisions of the courts that the foot-acre method could not be legally employed. From the best data available, the tonnage of coal contained in each tract was calculated. The report of the Commission describes the procedure as follows: "The estimator then determines what he believes from all of the evidence he has found in the course of his investigation the number of tons per foot-acre the property will yield on final mining, after making all reasonable deductions and allowances for uncertainties, and upon that tonnage and the probable cost of mining it, he bases his estimate of the value of the tract."⁹⁸

The total valuation of coal properties in the county was increased by the Commission from \$11,130,557 to \$12,539,753.

The Court, after making a few changes, adopted the report of the Commission. The mining companies appealed to the Supreme Court but the decision of the lower court was affirmed.

According to the Pennsylvania Supreme Court decisions the only strictly legal method of valuation is that based on actual sales. Exception has been taken to the "foot-acre" method, to valuation on the basis of royalty values, and to valuation based on the capitalized estimated profits.^{98a}

In Lackawanna County, by agreement between the County Commissioners and the coal mining companies, the valuation is based upon a standard of \$175 per foot-acre. In Luzerne County an engineering commission for the county assessors fixed the base rate at \$150 per foot-acre.^{98b}

⁹⁸*Report of the Coal Tax Commission of Northumberland County, Pa., 1907, p. 38.*

^{98a}See *D. L. & W. R. v. Tax Assessor*, 224 Pa. 240, 248-253, (1909). *Wilkes-Barre Coal Co. v. Assessor*, 225 Pa. 272. (1909). *Lehigh & Wilkes-Barre Coal v. Luzerne*, 225 Pa. 267, (1909). *Mineral R. R. & Mining Co. v. Northumberland, etc.*, 229 Pa. 436-457. (1911).

Philadelphia & Reading Coal & Iron Co. v. Northumberland, etc., 229 Pa. 460, (1911).

^{98b}Correspondence.

MINE ACCOUNTING AND REPORTS TO TAX COMMISSIONS

In order to secure justice among the mines in appraising for the purpose of taxation it is obviously necessary that uniform methods of accounting be followed, at least in so far as the accounts affect the reports filed with the Tax Commission. In a number of the states there has been friction due to irregularities in accountancy. The laws of certain of the western states are not sufficiently specific in the statement of what deductions may be made from gross earnings in order to determine the net.

It is possible that the requirements enforced by the Federal internal revenue officers in connection with the Federal income tax may be of some assistance to the state officials in prescribing similar rules controlling the accounting as it affects the records upon which the state appraisal is made. Uniform accounting has been urged by the state associations of operators in several of the important coal mining states and by the Federal Trade Commission.

The tendency of the tax commissions is to refrain from interfering in any way with the private records of the operators so long as the data requested are furnished in good form and are found to be accurate and complete. The recent law of New Mexico has been cited previously.⁹⁹ The Tax Commission is given power to prescribe the method of keeping accounts of mine companies.¹⁰⁰

In determining the net income of a corporation for a given year on which it is subject to the excise tax under the Act of August 5, 1909, the corporation is entitled to a "reasonable allowance" for depreciation of its property.¹⁰¹ Under such provision a mining corporation engaged in extracting ore from its mines is entitled to an allowance for depreciation equal to the value in place of the ore extracted and disposed of during the year.

REDEMPTION OF CAPITAL AND DEPRECIATION

While the subject of depreciation¹⁰² of mines¹⁰³ had previously received consideration, the enactment of the Federal

⁹⁹*Supra*, chap. IV.

¹⁰⁰*Laws of New Mexico*, 1915, chap. LV, sec. 2.

¹⁰¹*United States v. Nipissing Mines Co.*, 202 Fed. 803, (1912).

¹⁰²See Saliers, E. A. *Principles of Depreciation*. New York, 1915.

¹⁰³Mr. Finlay uses the term "depreciation" as meaning current construction costs. He says: "By depreciation I mean current construction costs; improvements. Depreciation means literally the process of losing

corporation excise tax and of the Federal income tax focused attention upon this phase of mining finance. Under the Federal income tax a deduction of not to exceed five percent of the gross value of the output at the mine may be permitted, but this depreciation must be based upon the actual cost of the properties containing the deposits. Unearned increment will not be considered in fixing the value on which depreciation shall be based. A general rearrangement of the system of accounting of some of the large companies has resulted from this ruling.¹⁰⁴

value: practically it means the exact opposite; it means expenses undertaken to counteract loss of value. It is maintenance. It only *seems* not to be maintenance because the items that compose these charges have the appearance of being new plant, not merely replacements of old plant." *Cost of Mining*, p. 42.

¹⁰⁴The following quotation, from the annual report for 1912 of the North Star Mines Co., illustrates this forcibly:

"The cost price of the mining property as at January 1, 1909, when the excise-tax law went into effect, was taken as \$1,778,245, which distributed among 1,039,871 tons of ore, the amount estimated to have been contained in the mine at the beginning of the company's operations in 1899, gives a cost rate of \$1.71 per ton. The application of this rate for the period up to January 1, 1909, on the 464,871 tons of ore then milled, reduced the cost value of the mining property to \$983,316; while the continuation of the principle through the years 1909, 1910, 1911 and 1912, according to the tonnage milled, has reduced the cost value of the original property to \$336,420 on which depreciation will continue at the rate of \$1.71 per ton until the balance of cost price is extinguished. In making this adjustment of the original cost of the property as at January 1, 1909, the company has also written up the value of the property as at that date, to the extent of \$1,136,684 to represent with the remaining cost value a fair estimate of the salable value of the mineral contents at January 1, 1909, according to data furnished by the company's engineers. The total amount charged against property account, therefore, on January 1, 1909, was \$2,120,000, which has been reduced by subsequent allowances for depreciation as above stated, to the sum of \$1,473,104. The company has been inclined to hold that the additional value written up to property account representing unearned increment accrued before the excise tax went into effect should also be subject to an allowance for depreciation; but the present ruling of the Treasury Department is not favorable to this view."

Another interesting complication is that resulting from the accounting methods of a large Nevada Corporation. The estimated average cost per ton of ore to the company for its entire tonnage was found to be \$16.36. The factors employed in establishing this per-ton-unit were the mine property cost and the estimated total tonnage acquired at the time

Corporations leasing oil or gas territory are permitted to base depreciation upon the cost of the lease and not upon the estimated value, in place, of the oil or gas. Operations carried on only upon a royalty basis may not make any deductions for depreciation.

An investigation of the records of a number of American mining companies demonstrated that sinking-funds are now being established in order to replace the capital invested.

the mine was purchased. During the early years of the operations, the best ore was mined at a considerable profit. By the time the Federal excise corporation tax was levied practically all of the best grades of ore had been mined and operations were being continued on the poorer grades of ore which, however, were returning a good profit. According to the regulations of the Internal Revenue Department, the income of the company might be determined in part from apparent profits measured by the net recovery per ton in excess of the estimated cost per ton. The accounts of the company showed in 1912 that the net realization from operations was \$11.75 per ton while the estimated cost per ton of all the ore at the time of purchasing the mine was \$16.36. On this basis the amount written off for depreciation of the property during 1912 exceeded the net earnings by \$2,043,888.61. During the calendar year of 1912, the dividends paid aggregated \$5,694,636.80. Under the present Federal income tax, not more than five percent of the gross value of the ore may be charged to depreciation.

CHAPTER VIII

THE TAX BURDEN

In this chapter it is proposed to present the available data showing the amount of taxes paid by various types of mining properties and to compare the taxes paid per unit of product by mines operating under the different tax systems. The data used have been secured from tax commission and other official state reports, United States census reports, annual reports of mining companies, and by correspondence with tax officials and mining companies.

Tables No. 12 to 26 inclusive are based upon data selected from Volume XI of the Thirteenth Census. They show the taxes paid in 1909 by the mines of the various states.

Table No. 12 includes data on the value of the product of the entire mining industry of each state; the total cost of securing this product, but not including taxes; the surplus above operating costs before taxes are paid; and the total amount of taxes paid by the mines in each state. From these data the ratio between the amount of taxes paid and the surplus above operating expenses has been calculated and the total amount of the taxes paid is given as a percentage of the surplus. For a number of the states the census statistics are not detailed enough to determine this percentage.

Under the assumption that the data as given are complete or at least representative, it is at once evident that the ratio of surplus and of gross earnings to taxes varies widely among the states. If the data for the twenty-one leading mining states are considered, it will be noted that the percentages of surplus paid as taxes range from 3.56 to 12.78, except for five states three of which are above this range and two below. Examining the list of sixteen still closer, it will be noted that nine of them range from 3.56 to 6.44 percent and seven from 8.01 to 12.78 percent. Each group includes some states employing the general property tax and states using a system of taxing output or earnings. The aggregate of the taxes paid in 1909 by all mines in the United States was \$17,796,793, which was 1.44 percent of the reported

TABLE No. 12.

TAXES PAID IN 1909 BY THE MINING INDUSTRY IN THE VARIOUS STATES.

State	Value of product in dollars	Expenses not including taxes in dollars	Surplus before taxes are paid in dollars	Taxes paid	Percent of surplus paid in taxes
Alabama.....	\$ 24,350,667	\$ 22,320,812	\$ 2,029,855	\$ 185,578	9.17
Arizona.....	34,217,651	33,265,197	952,454	454,119	47.68
Arkansas.....	4,603,845	4,306,280	297,565	18,405	6.18
California.....	63,382,454	60,624,729	2,757,725	626,456	22.80
Colorado.....	45,680,135	40,487,749	5,192,386	572,511	11.03
Connecticut.....	1,375,765	1,140,834	234,931	17,657	7.52
Delaware.....	516,213	507,313	8,900	1,624	18.25
Florida.....	8,846,665	5,839,039	3,007,626	70,493	2.34
Georgia.....	2,874,595	2,051,000	823,595	13,236	1.60
Idaho.....	8,649,342	7,040,618	1,608,624	158,145	9.83
Illinois.....	76,658,974	68,574,344	8,084,630	287,641	3.56
Indiana.....	21,934,201	20,177,422	1,756,779	176,404	10.04
Iowa.....	13,877,781	13,706,842	170,939	43,855	25.66
Kansas.....	18,722,634	15,720,064	3,002,570	148,155	4.94
Kentucky.....	12,100,075	11,649,234	450,841	96,354	21.37
Louisiana.....	6,547,050	6,574,054	-27,004	67,501	.....
Maine.....	2,056,063	1,860,100	195,963	16,241	8.29
Maryland.....	5,782,045	4,917,598	864,447	88,559	10.25
Massachusetts.....	3,467,888	2,946,988	520,900	40,187	7.72
Michigan.....	67,714,479	50,775,178	16,939,301	2,000,314	11.81
Minnesota.....	58,664,852	36,358,630	22,306,222	2,851,143	12.78
Missouri.....	31,667,525	27,585,678	4,081,847	159,321	3.90
Montana.....	54,991,961	47,570,158	7,421,803	456,191	6.15
Nebraska.....	322,517	259,635	62,882	414	.66
Nevada.....	23,271,597	17,279,729	5,991,868	257,476	4.30
New Hampshire.....	1,308,597	1,199,715	108,882	5,251	4.82
New Jersey.....	8,347,501	4,460,586	3,886,915	47,354	1.22
New Mexico.....	5,587,744	5,513,013	74,731	40,410	54.09
New York.....	13,334,975	9,830,143	3,504,832	174,389	4.98
North Carolina.....	1,358,617	Data inc	omplete	.....	.....
North Dakota.....	564,812	565,840	1,028	4,300	.....
Ohio.....	63,767,112	53,064,983	10,702,129	856,871	8.01
Oklahoma.....	25,637,892	20,847,533	4,790,359	308,497	6.44
Oregon.....	1,191,512	Data inc	omplete	.....	.....
Pennsylvania.....	349,059,786	295,689,950	53,369,836	5,707,325	10.69
Rhode Island.....	897,606	670,534	227,072	3,343	1.50

TABLE NO. 12—Continued.

TAXES PAID IN 1909 BY THE MINING INDUSTRY IN THE VARIOUS STATES.

State	Value of product in dollars	Expenses not including taxes in dollars	Surplus before taxes are paid in dollars	Taxes paid	Percent of surplus paid in taxes
South Carolina.....	1,252,792	1,024,040	228,752	10,783	4.71
South Dakota.....	6,432,417	5,196,914	1,235,503	105,251	8.53
Tennessee.....	12,692,547	11,971,728	720,819	94,920	13.17
Texas.....	10,742,150	8,260,725	2,481,425	62,653	2.53
Utah.....	22,083,282	18,086,033	3,991,249	234,524	5.87
Vermont.....	8,221,323	6,804,836	1,416,487	72,645	5.13
Virginia.....	8,795,646	8,816,955	incomplete	150,941	.....
Washington.....	10,537,556	8,571,208	1,966,348	103,356	5.26
West Virginia.....	76,287,889	70,687,505	5,600,384	971,405	17.35
Wisconsin.....	7,459,404	5,550,981	1,908,423	63,691	3.34
Wyoming.....	10,572,188	9,374,324	1,197,864	63,701	5.32

value of the product and 8.33 percent of the surplus above operating expenses, not including taxes.

It should be noted that these percentages of surplus paid in taxes must not be compared with similar percentages for other types of property because the mining percentages have been calculated without any allowance having been made for the redemption of the capital invested in the mine. As previously noted the operation of the mine destroys the resources of the mine and proper allowance must be made for this fact whenever comparisons are made between the taxes paid upon mines and the taxes upon other classes of property.

TAXES PAID IN THE STATES BY ALL MINES PRODUCING THE
SAME MINERAL

In Table No. 13 are given data for the coal mines of the principal coal producing states. According to the census report the mines of seven of the states were operating at a loss; this conclusion is based upon the statement of operating expenses (including taxes) and of receipts from the sale of the product. In two additional states the percentage of surplus going into taxes was over forty, although the total tax paid was \$234,021

for one state and \$83,020 for the other. The range in percentage of surplus paid in taxes was from 3.06 for Washington to 53.89 for Ohio. In those states in which coal mines were being operated at a loss the tax burden was of course greater than the burden in Ohio.

Most of the coal mining states tax coal mines on an ad valorem basis. Oklahoma taxed on output, but the census showed the Oklahoma mines to be operating at a loss. Utah

TABLE NO. 13.

TAXES PAID BY COAL MINES IN 1909, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Alabama	\$18,459,433	\$ 16,728,987	\$ 1,730,446	\$ 139,448	8.06
Arkansas	3,508,590	3,620,276	-111,686	10,250	
Colorado	15,782,197	14,146,369	1,635,828	133,126	8.14
Illinois	53,030,545	51,525,922	1,504,623	171,582	11.40
Indiana	15,018,123	14,823,601	194,522	83,230	42.79
Iowa	12,682,106	12,781,252	- 99,146	38,484	
Kansas	9,835,614	9,759,903	75,711	18,394	24.29
Kentucky	10,003,481	10,104,003	-100,522	67,946	
Maryland	4,483,137	3,621,504	621,504	79,726	12.83
Michigan	3,175,102	2,971,363	203,739	14,439	7.09
Missouri	5,881,034	5,708,816	182,218	6,911	3.79
Montana	5,117,444	4,550,956	566,488	33,718	5.95
New Mexico	3,984,660	3,247,954	736,706	27,071	3.67
North Dakota	563,212	519,145	44,067	4,265	9.68
Ohio	27,353,663	26,919,476	434,187	234,021	53.89
Oklahoma	6,185,078	6,498,852	-313,774	36,589	
Oregon	225,026	235,604	- 10,578	2,642	
Pennsylvania Bit.	147,466,417	125,816,488	21,649,929	2,344,575	10.83
" Anth.	148,957,894	131,567,747	17,390,147	2,677,853	15.39
Tennessee	6,688,454	6,810,500	-122,046	48,704	
Texas	3,136,004	2,799,739	336,265	12,340	3.67
Utah	4,111,987	3,162,396	949,591	55,183	5.81
Virginia	4,988,328	5,169,688	-181,360	117,232	
Washington	9,226,793	6,447,680	2,779,113	85,484	3.08
West Virginia	46,929,592	44,984,598	6,944,994	485,161	24.25
Wyoming	9,721,134	8,090,357	1,630,577	55,969	3.43

TABLE NO. 14.

TAXES PAID BY COPPER MINES IN 1909, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Arizona.....	\$ 31,614,116	\$ 24,979,482	\$ 6,634,634	\$ 404,046	6.09
California.....	10,104,373	7,701,231	2,403,142	48,003	2.02
Idaho.....	416,086	300,866	115,220	9,674	8.42
Michigan.....	30,165,443	23,508,650	6,656,793	950,821	14.28
Montana.....	45,960,517	37,678,032	8,282,485	395,577	4.78
Nevada.....	4,946,369	2,294,347	2,652,022	26,789	1.01
New Mexico.....	360,394			6,158	
Tennessee.....		Data incomplete			
Utah.....	8,843,099		2,082,984	66,190	3.18

imposes taxes upon net proceeds, and the mines in 1909 paid taxes amounting to 5.81 percent of the surplus above operating expenses. Montana, taxing in a similar manner, took 5.95 percent of the surplus. According to the statistics given, the anthracite industry of Pennsylvania paid 15.39 percent of the surplus in taxes,¹ while the bituminous mines paid 10.83 percent. Data for individual mines do not correspond closely with these results obtained from the census statistics.

Taxes paid by all of the copper mines in each of the important copper mining states are given in Table No. 14. Owing to the fact that the mines of a number of important copper mining districts produce gold and silver as by-product, the statistics given are not absolutely correct as showing the tax burden upon the copper produced. It is generally conceded that the copper mines of Michigan are assessed in excess of their actual value. The taxes paid in 1909 by the copper mines of Michigan were 14.28 percent of the net and 3.15 percent of the gross receipts. In none of the other important copper-producing states did the taxes amount to more than 6.1 percent of the net.

The percent of surplus paid in taxes by iron mines, as exhibited in Table No. 15, does not vary much among the states

¹The anthracite tax of two and one-half percent was not levied until 1913.

TABLE NO. 15.

TAXES PAID BY IRON MINES IN 1909, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Alabama.....	\$ 4,939,149	\$ 4,587,233	\$ 351,916	\$ 37,051	10.53
Georgia.....	331,178	301,464	29,714	3,065	10.32
Iowa.....		Data inc	omplete		
Maryland.....	44,341	40,524	3,817	582	15.25
Michigan.....	32,168,133	22,509,066	9,659,067	949,945	9.83
Minnesota.....	57,076,135	34,841,579	22,434,556	2,653,794	11.83
Missouri.....	203,849	150,020	53,829	810	1.51
New Jersey.....	1,651,091	1,314,565	336,526	7,350	2.18
New York.....	3,095,023	2,066,776	1,028,247	51,491	5.01
Ohio.....	24,419	22,312	2,107	389	18.46
Pennsylvania.....	789,296	358,168	431,128	19,415	4.51
Tennessee.....	815,181	827,815	-12,134	6,863	.....
Texas.....	Data inc	omplete			
Utah.....	100,844	184,927	- 84,083	502	.....
Virginia.....	1,683,003	1,494,678	188,325	16,565	8.80
Wisconsin.....	2,972,584	1,751,885	1,220,699	46,710	3.83
Wyoming.....	Data inc	omplete			

producing important quantities of iron ore. Only three states produced more than four million tons per annum, namely, Minnesota, Michigan, and Alabama. The percentages paid in taxes in 1909 were 9.83, 11.83, and 10.53 respectively. The percentage paid by the iron mines in other states was as a rule much lower, as, New Jersey, 1.51 percent; New York, 5.01 percent; Pennsylvania, 4.51 percent; and Wisconsin, 3.83 percent.²

The census data on the deep gold and silver mines are not conclusive, as much gold and silver is produced as a by-product in the mining of copper and lead. Practically the only states for which the data can be used are South Dakota and California. In the former the percentage of the surplus paid in taxes was 7.34, while in the latter it was 35.43. The available data are given in Table No. 16. Statistics on gold placers are given in Table No. 17. California is the principal state in this group,

²Since 1909 the taxes of the iron mines in a number of these states have been increased greatly.

TABLE No. 16.

TAXES PAID BY GOLD AND SILVER MINES IN 1909, BY STATES (Deep mines only).

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Arizona.....	\$ 2,170,627	\$ 2,755,217	\$ -585,590	\$ 26,176	.....
California.....	9,690,956	9,344,688	346,268	122,656	35.43
Colorado.....	Data inc	omplete			.....
Idaho.....	7,926,602	6,439,546	1,487,058	143,237	9.63
Montana.....	3,002,328	2,978,814	23,514	17,309	73.63
Nevada.....	17,807,945	11,391,815	6,416,130	212,663	3.32
New Mexico.....	625,626	1,118,740	-493,114	4,133	.....
Oregon.....	468,732	575,697	-106,965	4,027	.....
South Carolina.....	8,550	31,311	- 22,761	624	.....
South Dakota.....	6,120,970	4,744,624	1,376,346	101,025	7.34
Utah.....	8,541,522	5,980,378	2,661,144	84,125	3.16
Washington.....	156,227	.....	.....	2,855	.....

TABLE No. 17.

TAXES PAID BY GOLD PLACERS IN 1909, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
California.....	\$ 8,751,032	\$ 5,517,855	\$ 3,233,177	\$ 91,000	2.82
Colorado.....	448,586	248,521	200,065	13,111	6.56
Georgia.....	19,633	18,931	702	1,100	.....
Idaho.....	220,743	233,604	- 12,861	4,882	.....
Montana.....	502,653	398,296	104,357	4,988	4.78
Nevada.....	62,652	80,852	- 18,200	340	.....
North Carolina.....	57,319	53,755	3,564	500	14.03
Oregon.....	159,002	117,559	41,443	3,238	7.81
Utah.....	4,178	4,060	118	100	.....
Washington.....	3,700	3,667	33	28	.....

the percentage of surplus in taxes in 1909 having been 2.82.

It is difficult to secure data for the lead and zinc industry by states as many mines produce lead and zinc with other metals. The only important lead and zinc states for which data were given were Wisconsin and Missouri. In the former 1.14 percent of the surplus was paid in taxes; in the latter, 3.62 percent.

Table No. 19 presents statistics for the petroleum and natural gas industries in the various states. In only one state was the percent of surplus paid in taxes over 9.01 percent. In West Virginia it was 12.15. In the eleven states for which data are

TABLE NO. 18.

TAXES PAID BY LEAD AND ZINC MINES IN 1909, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Arkansas.....	\$ 34,810	\$ 39,365	\$ - 4,555	\$ 218	.....
Colorado.....		Data inc	omplete		
Idaho.....		Data inc	omplete		
Illinois.....	292,453	212,905	79,548	232	.29
Iowa.....	6,779	Data inc	omplete		
Kansas.....	1,059,540	1,066,345	- 6,805	1,193	.....
Missouri.....	22,565,528	18,996,787	3,568,741	129,138	3.62
Montana.....		Data inc	omplete		
Nevada.....	68,774	46,947	21,827	425	1.95
New Jersey.....		Data inc	omplete		
New Mexico.....		Data inc	omplete		
Oklahoma.....	695,235	660,718	35,517	3,100	8.73
Tennessee.....		Data inc	omplete		
Utah.....		Data inc	omplete		
Wisconsin.....	1,989,907	1,611,795	378,112	4,308	1.14

TABLE No. 19.

TAXES PAID IN 1909 BY PETROLEUM AND NATURAL GAS PRODUCERS, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Arkansas.....	\$ 126,400	\$ 155,262	\$ - 28,862	\$ 1,768	.....
California.....	29,310,335	24,933,418	4,376,917	276,669	6.32
Colorado.....	317,680	319,990	- 2,310	8,140	.....
Illinois.....	18,895,815	13,403,946	5,491,869	72,107	1.32
Indiana.....	3,224,619	2,410,223	814,396	73,362	9.01
Kansas.....	6,681,780	3,896,229	2,785,551	122,230	4.39
Kentucky.....	892,281	555,420	336,861	22,488	6.65
Louisiana.....	.....	Data inc	omplete	.....	.....
Missouri.....	11,455	14,734	- 3,279	52	.....
New York.....	2,668,996	1,494,031	1,174,962	64,657	5.50
Ohio.....	29,620,959	20,647,897	8,973,062	585,542	6.53
Oklahoma.....	17,685,092	12,689,260	4,995,832	261,631	5.24
Pennsylvania.....	39,197,475	21,447,544	17,719,931	521,436	2.94
Texas.....	6,391,313	4,242,605	2,148,708	43,958	2.05
West Virginia.....	28,188,087	24,528,735	3,659,352	476,343	12.15
Wyoming.....	18,929	156,377	-137,448	284	.....

available, the oil and gas wells in three states paid less than 3 percent in taxes, and six of the others paid between 4 and 7 percent.

In the states producing phosphate rock the percent of surplus paid in taxes ranged from 2.27 to 3.84. The available data are given in Table No. 20.

According to the census statistics given in Table No. 21 the percent of surplus paid in taxes in the gypsum mines varied widely among the states. In three states it was between 1 and 1.5 percent; in four states, between 4.75 and 6 percent; in two states between 8.5 and 9 percent; in one state 17.53 and in another 22.43 percent. Data on the quarrying industry are given in Tables No. 22 to 26 inclusive.

TABLE NO. 20.

TAXES PAID IN 1909 BY PHOSPHATE MINES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Florida.....	\$ 8,488,801	\$ 5,527,140	\$ 2,961,661	\$ 67,118	2.27
South Carolina.....	862,409	666,577	195,832	7,512	3.84
Tennessee.....	1,395,942	1,113,119	282,823	9,670	3.42

TABLE NO. 21.

TAXES PAID IN 1909 BY GYPSUM MINES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
California.....	\$ 103,845	\$ 118,000	\$ 14,164	\$ 838	5.92
Colorado.....		Data incomplete			
Iowa.....	669,731	485,587	184,144	2,044	1.11
Kansas.....	318,678	284,264	34,414	2,935	8.53
Michigan.....	1,220,321	1,032,888	187,433	9,748	5.20
Nevada.....	278,243	263,881	14,362	2,517	17.53
New Mexico.....	106,964	91,662	15,302	881	5.76
New York.....	1,048,403	911,219	137,184	6,495	4.73
Oklahoma.....	417,594	397,128	20,466	4,592	22.43
Texas.....	387,739	358,478	29,261	2,609	8.92
Utah.....	81,493	62,223	19,270	313	1.62
Wyoming.....	132,719	114,661	18,058	258	1.43

TABLE No. 22.

TAXES PAID IN 1909 BY GRANITE QUARRIES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
California.....	\$ 1,518,916	\$ 1,216,361	\$ 302,555	\$ 9,158	3.03
Colorado.....	78,865	79,058	— 193	383	.....
Connecticut.....	617,667	544,188	73,479	3,317	4.53
Delaware.....	453,284	447,584	5,700	1,149	20.16
Georgia.....	852,610	680,249	172,461	2,056	1.19
Idaho.....	.....	Data incomplete	.....	.....	.....
Maine.....	1,761,801	1,584,420	177,381	13,263	7.47
Maryland.....	556,476	480,505	75,971	2,619	3.45
Massachusetts.....	2,185,986	1,943,710	242,276	29,920	12.42
Minnesota.....	672,904	465,847	207,057	2,006	.97
Missouri.....	155,717	123,563	32,154	1,237	3.85
Montana.....	.....	Data incomplete	.....	.....	.....
New Hampshire.....	1,205,811	1,048,559	157,252	4,526	2.88
New Jersey.....	60,174	52,337	7,837	34	.43
New York.....	444,435	382,934	61,501	2,161	3.51
North Carolina.....	766,931	755,541	11,390	2,918	.26
Oklahoma.....	60,289	59,502	787	455	57.81
Oregon.....	152,221	128,654	23,567	2,029	8.61
Pennsylvania.....	603,089	485,354	117,735	4,545	3.86
Rhode Island.....	897,606	670,534	227,072	3,343	1.47
South Carolina.....	166,710	175,788	— 9,078	1,415	.....
South Dakota.....	23,188	18,971	4,217	3	.....
Texas.....	135,221	111,458	23,763	486	2.05
Utah.....	28,625	20,800	7,825	47	.67
Vermont.....	2,829,522	2,291,208	538,314	14,714	2.73
Virginia.....	473,344	368,113	105,231	2,046	1.95
Washington.....	739,107	574,841	164,266	2,750	1.67
Wisconsin.....	1,433,105	1,281,689	151,416	6,225	4.11

TABLE NO. 23.

TAXES PAID IN 1909 BY LIMESTONE QUARRIES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Alabama.....	\$ 599,353	\$ 553,284	\$ 146,069	\$ 2,284	4.96
Arkansas.....	112,468	103,830	8,638	701	8.12
California.....	368,486	305,178	63,308	1,301	2.06
Colorado.....	331,408	314,141	17,267	1,801	10.43
Florida.....	29,027	33,926	- 4,899	509	
Georgia.....	15,080	12,337	2,743	650	23.70
Illinois.....	3,977,359	2,861,237	1,116,122	21,702	1.94
Indiana.....	3,616,696	2,847,812	768,884	18,932	2.46
Iowa.....	499,665	369,658	130,007	2,679	2.06
Kansas.....	807,463	666,531	140,932	2,736	1.94
Kentucky.....	851,875	635,325	216,450	3,062	1.41
Maryland.....	143,258	49,735	93,523	374	.40
Michigan.....	795,286	674,447	120,839	10,879	9.01
Minnesota.....	641,344	517,933	123,411	6,922	5.61
Missouri.....	2,027,902	1,642,270	385,632	10,900	2.83
Montana.....	154,064	114,388	39,676	423	1.01
Nebraska.....	322,517	259,635	62,882	414	.66
New Jersey.....	180,604	163,688	16,916	189	6.12
New York.....	2,656,142	2,092,718	563,424	18,934	3.36
Ohio.....	3,363,149	2,687,650	675,499	24,276	3.60
Oklahoma.....	487,883	378,512	109,371	1,151	1.05
Pennsylvania.....	4,733,819	3,950,054	783,765	19,724	2.52
Tennessee.....	417,506	355,517	61,989	1,177	1.90
Texas.....	312,413	246,570	65,843	710	1.08
Utah.....	190,825	157,588	33,237	524	1.58
Vermont.....	17,580	12,888	4,698	247	5.26
Virginia.....	300,438	263,138	37,300	1,740	4.67
West Virginia.....	835,498	615,768	219,730	1,875	.85
Wisconsin.....	842,116	642,865	199,251	3,864	1.94
Wyoming.....	21,700	16,479	5,221	245	4.69

Before passing to a consideration of the taxes paid by individual mines, attention may be directed to a comparison between the taxes paid in the same state by different divisions of the mineral industry.

TABLE NO. 24.

TAXES PAID IN 1909 BY MARBLE QUARRIES IN THE LEADING STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Georgia.....	\$ 767,349	\$ 323,751	\$ 443,598	\$ 1,678	.38
Massachusetts.....	252,557	220,832	31,725	1,984	6.25
New York.....	344,981	303,813	41,168	2,878	6.99
Tennessee.....	613,741	481,182	132,559	2,934	2.21
Vermont.....	3,277,651	2,547,573	730,078	50,660	6.94

The mineral industry of California paid as taxes 22.8 percent of the surplus. The copper mines paid 2.02 percent; the deep gold mines, 35.43 percent; the placer mines, 2.82 percent; the petroleum and natural gas wells, 6.32 percent; the granite quarries, 3.03 percent; the limestone quarries, 2.06 percent; and the sandstone quarries, 10.74 percent.

In Illinois, the mining industry paid taxes amounting to 3.56 percent of the surplus. The coal mines paid 8.14 percent; the petroleum and natural gas wells, 1.32 percent; and the limestone quarries, 1.94 percent.

In Indiana, the entire mining industry paid 10.04 percent in taxes; the coal mines, 42.79 percent; the petroleum and natural gas wells, 9.01 percent; and the limestone quarries, 2.46 percent.

In Michigan, the mineral industry paid taxes amounting to 11.01 percent of the surplus. The coal mines paid 7.09 percent; the copper mines, 14.28 percent; the iron mines, 9.83 percent; the gypsum mines and plants, 5.20 percent; and the limestone quarries, 9.01 percent.

In Ohio, coal mines paid taxes amounting to 53.89 percent of the surplus; the petroleum and natural gas wells, 6.53 percent; while the mineral industry of the entire state averaged 8.01 percent.

In West Virginia, the mineral industry paid in taxes 17.35 percent of the surplus. The coal mines paid 24.95 percent; the petroleum and natural gas wells, 12.15 percent; the limestone

TABLE NO. 25.

TAXES PAID IN 1909 BY SANDSTONE QUARRIES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Alabama.....	\$ 65,687	\$ 63,129	\$ 2,558	\$ 307	12.00
Arizona.....	297,184	307,960	- 10,776	811	.....
Arkansas.....	78,160	46,867	31,293	306	.98
California.....	289,579	260,193	29,386	3,158	10.74
Colorado.....	189,780	171,549	18,231	928	5.09
Connecticut.....	191,760	112,090	79,670	11,278	14.16
Idaho.....	30,004	Data incomplete			
Illinois.....	30,360	20,316	10,044	89	.89
Kansas.....	19,559	10,945	8,614	82	.95
Kentucky.....	90,834	64,857	25,977	657	2.53
Maryland.....	16,070	16,022	48	43	.....
Massachusetts.....	270,002	268,359	1,643	2,563	.....
Michigan.....		Data incomplete			
Minnesota.....		Data incomplete			
Missouri.....	29,272	25,290	3,982	226	5.68
Montana.....	74,593	73,357	1,236	514	41.59
New Jersey.....	187,272	142,221	45,057	1,237	2.75
New York:					
Sandstone.....	508,638	427,452	81,186	2,146	2.64
Bluestone.....	910,054	689,603	220,451	1,987	.90
Ohio.....	2,398,306	2,018,916	379,390	6,764	1.82
Oklahoma.....	59,455	40,141	19,314	151	.78
Pennsylvania:					
Sandstone.....	1,549,508	1,371,022	178,486	11,130	6.24
Bluestone.....	656,120	476,534	179,586	2,897	1.61
South Dakota.....	89,028	84,355	4,673	94	2.01
Texas.....	72,609	50,948	21,661	204	.94
Utah.....	71,485	66,714	4,771	30	.63
Virginia.....		Data incomplete			
Washington.....	271,207	274,864	3,657	1,569	.....
West Virginia.....	243,435	187,532	55,903	1,256	2.25
Wisconsin.....	200,236	139,684	60,552	1,078	1.78
Wyoming.....	22,855	16,216	6,639	245	3.69

TABLE NO. 26.
TAXES PAID IN 1909 BY SLATE QUARRIES, BY STATES.

State	Value of product	Expenses not including taxes	Surplus before taxes are paid	Taxes paid	Percent of surplus paid in taxes
Maine.....	\$ 223,809	\$ 224,896	\$ 1,087	\$ 2,805	.....
Maryland.....	129,538	109,193	20,345	1,343	6.60
New York.....	99,827	99,109	808	405	50.12
Pennsylvania.....	3,492,026	3,386,985	105,041	20,119	19.16
Vermont.....	1,864,591	1,681,745	182,846	5,248	2.87
Virginia.....	182,543	232,030	49,487	2,276	.....

quarries 0.85 percent; and the sandstone quarries, 2.25 percent.

Statistics collected by the West Virginia Coal Association show that the coal industry of West Virginia paid in taxes for the year 1915 the sum of \$2,242,311.51. The total assessed value of coal properties in the state amounted to \$186,843,411. In addition to the state taxes on property the mining corporations pay a corporation tax in the form of a license fee and also an excise tax.

The total assessed valuation of the coal industry was second only to the taxes paid by the steam railroads, namely \$188,910,745. The oil and gas companies were assessed \$99,434,636.³

In Pennsylvania, the following may be noted:

	Percentage of surplus paid in taxes
All mineral industries, in 1909.....	10.69
Bituminous coal mines.....	10.83
Anthracite mines	15.39
Iron mines	4.51
Petroleum and natural gas wells.....	2.94
Granite quarries	3.86
Limestone quarries	2.52
Sandstone quarries	6.24
Slate quarries	19.16

³*Black Diamond*, 1916, LVII, 347.

TAXES PAID BY INDIVIDUAL MINING COMPANIES

In many of the published reports of mines the amount of the taxes paid is combined with other expenses so that it has been impractical to secure data for these mines. In Tables No.

TABLE No. 27.

TAXES PAID BY COPPER MINING COMPANIES.

Company	Date	Net value of product in M dollars	Taxes paid			
			Total	Per ton ore mined	Per pound copper	Per cent net
Copper Queen ⁴	1900		\$ 13,158			
Copper Queen ⁵	1912		248,109			
Copper Queen ⁶	1913	6,917M	349,774	\$.532		
Ray Consol'd ⁶	1912	⁸ 1,814M	40,713	.026		
Ray Consol'd ⁶	1913	⁸ 2,497M		.003		
Miami ⁶	1913	⁹				10.0
Atlantic ⁴	1904	65M	6,592	.017	.0012	10.16
Baltic ⁴	1908	1,004M	38,313	.050	.00216	3.82
Baltic ⁴	1912	758M	61,276	.0939	.005	8.08
Champion ⁴	1908	959M	55,179	.0694	.0031	5.75
Champion ⁴	1912	1,313M	62,199	.081	.0039	4.74
Trimountain ⁴	1908	91M	37,903	.011	.0063	41.50
Trimountain ⁴	1912	349M	40,681	.110	.0059	11.65
Quincy ⁴	1912	1,105M		.048	.003	
Calumet and Hecla ⁴	1912	4,614M			.006	9.0
Anaconda ⁷	1912	11,447M	625,900	.137	.002	5.5
Amalgamated ⁷	1903-13	83,053M	2,001,504			2.41
Nevada Douglas ⁷	1912	¹⁰ 47M	1,462	.0516		3.12
Chino ⁷	1913	3,190M	43,409	.0223	.00086	1.36
Utah Copper ⁷	1908	¹¹ 2,402M	7,588		.00012	

⁴General property tax.

⁵Bullion tax.

⁶Gross and net earnings tax.

⁷Net proceeds tax.

⁸Skinner, E. N. and Plate, H. R. *Mining Costs of the World*, p. 29.

⁹Reported by Mr. J. P. Channing.

¹⁰For 4 months only.

¹¹Assessed at \$1,000,000.

TABLE No. 28.
TAXES PAID BY IRON MINES.

Locality	Date	Taxes paid			
		Total paid	Per ton shipped	Per ton mined	Per cent net
Michigan: ¹⁷					
Gogebic Range.....	1902-06		.06		
Marquette Range.....	1902-06		.04		
Menominee Range.....	1902-06		.05		
Gogebic Range.....	1912		.10372	.13539	
Gogebic Range.....	1913		.13999	.12523	
Gogebic Range.....	1909-13			.11801	8.56
Iron County.....	1912		.06676	.07617	
Iron County.....	1913		.09907	.09675	
Iron County.....	1909-13			.06403	9.14
Menominee Range.....	1912		.15652	.17200	
Menominee Range.....	1913		.15432	.16072	
Menominee Range.....	1909-13			.13555	17.83
Marquette Range.....	1912		.12970	.14250	
Marquette Range.....	1913		.13066	.12095	
Marquette Range.....	1909-13			.11417	12.51
State.....	1912		.10807	.12644	
State.....	1913		.12709	.12144	
State.....	1909-13			.10647	10.95
Minnesota: ¹⁷					
Mesabi Range.....	1902-06		.07		
Vermillion Range.....	1902-06		.04		
State.....	1906	\$ 179,272	.00707 ¹²		
State.....	, 1907	671,489	.023 ¹²		
State.....	1908	604,264	.032 ¹²		
State.....	1913	1,291,081	.036 ¹²		
State.....	1914	1,314,538	.059 ¹²		
State.....	1913	6,258,291	.1758 ¹³		
State.....	1914		.23 ¹⁴		
State.....	1906-14		.0284 ¹⁵		
Wisconsin.....	1914	17,820 ¹⁶			5.205

¹²State taxes only.

¹³State and local taxes.

¹⁴State and local taxes, estimated.

¹⁵Average of state taxes.

¹⁶State income tax only.

¹⁷General property tax.

27 to 30 inclusive are grouped the taxes paid in recent years by copper, iron, coal, and gold and silver mining companies. Additional historical data, of interest for comparative purposes, are included in the text. In addition to the statistics of taxes paid, data showing the assessed valuation of mining property are included in order to show present tendencies in valuing mines and mineral lands.

TABLE NO. 29.

TAXES PAID BY COAL MINING COMPANIES.

Company	Date	Net value in M dollars	Taxes paid		
			Total	Per ton	Per cent net
Pennsylvania: ²¹					
Philadelphia and Read- ing Coal and Iron.....	1908			\$.033	
Delaware & Hudson.....	1912			.045	
Lehigh Coal & Navig'n...	1904	1,466 ¹⁸	\$ 224,700	.1098 ¹⁹	15.28
Lehigh Coal & Navig'n...	1909	1,887 ¹⁸	292,400	.0922 ¹⁹	15.49
Lehigh Coal & Navig'n...	1913	2,372 ¹⁸	540,700	.125 ¹⁹	22.80
Virginia ²¹	1905-06			.011 ²⁰	

¹⁸Net credited to profit and loss.¹⁹Based on all taxes paid by company.²⁰Finlay, *Cost of Mining*, p. 73.²¹General property tax.

TABLE NO. 30.

TAXES PAID BY GOLD AND SILVER MINING COMPANIES.

Company	Date	Taxes paid			
		Total taxes	Per ton	Percent gross	Percent net
California: ²²					
Gold dredging company	1910		.0018 ²⁶	1.58	4.04
Brunswick.....	1913	899.85	.059	.435	1.04
North Star.....	1913	28,293	.267	2.36	5.12
Colorado: ²⁴					
Iron Silver.....	1906	12,851	.0892	1.17	2.49
Liberty Bell.....	1908		.10	1.31	6.58
Liberty Bell.....	1911		.09	1.00	2.02 ²⁷
Tom Boy.....	1911		.16	2.38	6.83
Tom Boy.....	1913		.15	1.87	4.13 ²⁸
El Paso.....	1912			.66	2.27
Vindicator.....	1911	9,329.32	.485	1.44	3.80
Idaho: ²⁵					
Bunker Hill & Sullivan..	1909	52,839	.153	1.68	4.82
Bunker Hill & Sullivan..	1911	36,993	.0845	1.12	3.33
Nevada: ²⁵					
Goldfield Consolidated ..	1913	41,370 ²³	.12	1.06	1.92
Goldfield Consolidated ..	1913	10,014 ²⁹	.03		
Goldfield Consolidated ..	1913	25,025 ³⁰	.07	.495	.90
Montana Tonopah.....	1911-12	7,392.21	.137	.95	2.66
Nevada Hills.....	1913		.062	.50	1.47
Nevada Wonder.....	1913	2,507.73	.065	.49	3.80
Nevada Wonder.....	1914	6,772.13	.145 ³¹	1.55	3.80
Tonopah Belmont.....	1912	40,954.68	.354	1.25	2.28
Tonopah Belmont.....	1913	10,487.06	.081	.36	1.38
Tonopah Belmont.....	1914	39,206.79	.227	1.16	1.95
Tonopah Mining.....	1913	29,685.08	.171	1.05	1.87
Tonopah Mining.....	1914	40,811.07	.249	1.57	2.96
Tonopah Mining.....	1915	74,868.42	.522	3.47	7.95
South Dakota: ²²					
Homestake.....	1911	59,010.89	.0402	1.124	4.129 ³²
Homestake.....	1912	112,490.65	.0736	1.704	4.142 ³²
Homestake.....	1913	115,390.93	.0749	1.865	5.495 ³²

22-32 Footnotes on page 229.

According to Mr. J. Ross Browne²² the Eureka Gold Mining Company, operating a gold placer in California, produced \$147,529.50 between June 5, 1863 and August 11, 1864. Of this sum there was credited to dividends \$66,000 and there remained a balance above taxes of \$4,078.45. The taxes paid amounted to \$108.40.

It has frequently been urged that many precious metal mines have not paid to the state a proper share of the profits. The following data are interesting as they show the amount of taxes paid and the ratio between the taxes and earnings during the "bonanza" period in several of the western mining states.

Data on two Nevada mines as reported by Mr. Browne²⁴ and by Mr. James D. Hague,²⁵ are given in Table No. 31.

TABLE No. 31.

DATA SHOWING TAXES PAID BY NEVADA MINING COMPANIES IN 1867 TO 1869.

	1867	1868	1869
Savage Mining Company:			
Tons produced.....	70,721	87,342	53,954
Total costs per ton including taxes.....	21.95	20.95	21.22
Profit per ton.....	19.90	19.89	13.75
Total taxes.....	\$20,937.52	40,342.61	19,486.73
Taxes per ton.....	0.29	0.46	0.36
Percentage of profit to taxes.....	1.46	2.29	2.67
Hale and Norcross S. Mining Co.:			
Tons produced.....	29,404	25,432	
Total yield.....	\$1,355,220.40		
Total cost.....	266,679.18		
Net, above operating expenses.....	1,088,541.22		
Total taxes.....	11,113.90	12,404.04	
Taxes per ton.....	.38	.49	
Percentage of net to taxes.....	1.021		

²²General property tax.²³Bullion tax.²⁴Gross and net earnings tax.²⁷Net value per ton increased from \$1.52 in 1908 to \$4.45 in 1911.²⁸Net value per ton increased from \$2.67 in 1911 to \$3.70 in 1913.²⁹Property tax.³¹Increases due to change in assessing.²⁵Net proceeds tax.²⁶Per cubic yard.³⁰Federal income tax.³²Based on dividends paid.³³*Mineral Resources of the United States.* 1867-68. p. 189.³⁴*Mineral Resources of the Pacific Slope.* p. 375.³⁵*Mining Industry. Exploration of the 40th Parallel.* p. 154.

The Consolidated Virginia mines in the year 1875 produced bullion worth \$16,957,538.99. Dividends amounting to \$12,204,000 and taxes amounting to \$152,795.13 were paid.³⁶ The taxes amounted to 1.252 percent of the dividends.

Table No. 27 shows the taxes paid per ton of ore mined and per pound of copper, and, when the data are available, the percent of the net earnings paid in taxes.

Data are given in Table No. 28 for the average of the iron ranges of Minnesota and Michigan. Comparison may be made of the taxes per ton of ore mined and shipped and the percent of the net earnings paid for taxes.

But few data are available on coal mines, and these are chiefly on anthracite mines. The available data are given in Table No. 29 and are expressed principally as taxes per ton and as percentages of the net earnings paid for taxes.

Data on gold and silver mining companies are given in Table No. 30. Most of the data are for the years since 1910 and therefore offer little basis for comparison with the census data in Tables No. 16 and 17. It has not been possible to determine the net value upon the same basis for all mines, but in general the figures given are accurate enough for comparison between the different systems of taxation.

Taken as a whole the data in Table No. 30 show that the precious metal mines, in the five states for which data are given, pay as taxes a smaller percentage of the net earnings or surplus above operating expenses than most mines of the same type operating under other systems of taxation. None of the Nevada mines for which data are given was paying more than 3.80 percent in taxes until 1914. In all of the other states listed, most mines are paying more than this. The foregoing statement does not imply that the mines in each state were not paying their share of the taxes as compared with other classes of property in the same district.

Some of the typical gold mines may be compared. The North Star in California paid 5.12 percent in taxes in 1913, while the Homestake in South Dakota, also taxed under the general property tax, paid 5.495 percent. Operating under a net proceeds tax were the Tonopah Mining Company of Nevada

³⁶Raymond, R. W. Statistics of mines and mining in the states and territories west of the Rocky Mountains. *8th Annual Report, Commissioner of Mineral Statistics*. Washington, 1877. p. 155.

which paid 2.96 per ton in 1914,³⁷ and the Bunker Hill and Sullivan of Idaho which paid 3.33 percent in 1911.

Arizona. In 1911 the valuation of mining property as equalized by the Territorial Board of Equalization was as follows:

Productive patented mines, 526.....	\$ 10,568,560.80
Improvements on productive patented mines.....	685,254.00
Non-productive patented mines, 81,031 acres.....	2,898,465.38
Improvements on non-productive patented mines...	1,919,748.00
Patented mill-sites, 714.97 acres	28,667.58
Improvements on productive unpatented mines and claims	74,400.00
Improvements on non-productive mines and claims	526,666.50
Smelters, not included in improvements on mines and claims	2,540,569.00
All mining property, 93 percent of the total.....	19,242,331.36
All property subject to taxation.....	98,032,708.64
All mining property, 1912, 31.7 percent of total.....	42,145,084.49
All mining property, 1913, 37.2 percent of total.....	140,488,649.30
All mining property, 1914, 35.7 percent of total.....	134,247,752.59
All productive mines, 1916 ^{37a}	212,301,620.55

Colorado. The assessed valuation returned by the county assessors of Colorado in 1913 and 1914 was as follows:

	1913	1914
Non-productive metalliferous mining claims	\$13,796,749	\$14,433,012
Improvements on metalliferous mining claims	8,929,872	9,048,223
Assessment on output from metallifer- ous mining claims.....	18,728,434	13,309,939
Total as returned by assessors.....	41,455,055	36,791,174
Total as corrected by the tax commis- sion	46,042,067	41,468,531

The increase from \$18,012,830 in 1912 to \$46,042,067 in 1913

³⁷The report of the Tonopah Mining Company for the year ended February 28, 1915, shows that the taxes paid during the previous fiscal year amounted to 7.95 percent of the net earnings.

^{37a}Zander, C. M., Assessment of mining property in Arizona. *Bulletin of National Tax Association*, 1916, II, 20.

was due to the change in the law.³⁸ The metal mines in 1912 were assessed at 4.27 percent of the total for the state; in 1913, 3.52 percent; in 1914, 3.17 percent; and in 1915, 2.64 percent.

In the fifteen principal metal mining counties of Colorado the mines have paid a large proportion of the taxes, as shown by the following statistics of assessed valuation:

Assessed value of all min- ing property	1912	1913	1914
Assessed value of all other property	\$17,896,173	\$43,546,803	\$38,667,874
	36,974,647	109,446,426	107,134,265

Coal land and improvements were returned by the county assessors of Colorado as shown in Table No. 32.

TABLE No. 32.

ASSESSED VALUE OF COAL LANDS AND IMPROVEMENTS IN COLORADO.

	Acres	Assessed value	
		Total	Per acre
1913			
Productive coal land.....	58,812	\$7,239,380	\$ 123.10
Non-productive coal land.....	205,413	8,806,892	42.68
Improv'm'ts on productive land.....		4,741,029	
Improv'm'ts on non-productive land.....		88,260	
Coal reserves.....	31,791	335,020	24.30
1914			
Productive coal land.....	57,648	\$7,103,355	\$ 123.22
Non-productive coal land.....	210,015	9,131,503	43.48
Improv'm'ts, productive land.....		5,299,790	
Improv'm'ts, non-productive land.....		346,060	
Coal reserves.....	12,242	283,460	23.15

Nevada. Statistics of taxes paid by Nevada mines in 1911, 1912, and 1913 are given in the accompanying table:

	1911 ³⁹	1912	1913 ⁴⁰
Bullion tax collected \$	259,625.90	\$165,508.78	\$ 182,076.37
Tonnage	4,242,006.00		5,286,338.00
Value	32,515,030.39		32,701,522.47

³⁸*Supra*, Chapters III and IV.

³⁹*Annual Report Bullion Tax Agent*, 1912, p. 50.

⁴⁰*Report for 1913-14, Nevada Tax Commission*, p. 21.

Utah. According to the Report of the Utah State Board of Equalization⁴¹ for 1913-14 the assessed value of the mining property for the state was as follows:

	1913	1914
Mining companies	\$ 3,721,407	\$ 3,990,283
Net proceeds	11,393,366	9,649,932
Mining claims		1,131,952
Total of all property.....	213,868,897	221,720,400

Virginia. The assessed value for 1913 of mineral lands in Virginia⁴² is shown by the following data:

Lands under development	Per acre	Total
Value of land	\$ 5.06	\$ 640,323
Value of minerals	21.42	2,715,422
Value of improvements and machinery	49.80	6,323,651
Total	\$76.28	\$ 9,676,376
Lands not under development		
Value of land	2.84	6,409,530
Value of minerals	4.56	10,277,093
Value of improvements and machinery	.49	1,113,220
Total	\$ 7.89	\$17,799,843
Total value of land		\$ 7,049,853
Total value of minerals		12,992,515
Total value of improvements and machinery.....		7,433,871
Total		\$27,476,239

Wyoming. The state and county taxes on the output of the mines of Wyoming amounted to \$62,878.48 in 1908 and to \$30,094.51 in 1910. The mines in Sweetwater and Uinta counties paid over \$40,000 in 1908, the rate being approximately \$19 per \$1000; in 1910 the mines in these counties paid \$27,000, the rate having been reduced to less than \$8 in both counties. In 1913, the output tax of the mines of the state amounted to \$47,734.95. The mines of Sweetwater county were taxed at a rate of \$8.88 and paid \$22,164.14 of the total of \$47,734.95.

⁴¹Report for 1913-14, Utah State Board of Equalization, pp. 26, 54, 57.

⁴²Report of Joint Committee on Tax Revision, Virginia, 1914, pp. 31-33.

CHAPTER IX

SUGGESTED METHODS OF TAXATION AND REFORMS

The prevailing methods of taxing mines have provoked much discussion and have frequently been criticised as being unjust and inefficient. From time to time there have been made many suggestions for the correction of apparent or imagined faults in the system. At the present time there seems to be generally a sincere desire, on the part of the mine owners and the tax officials alike, to discover the facts and to equalize the tax burden. In a number of the western states the mine operators have realized that within the local taxing district at least there is little to be gained by attempts at concealment of the physical condition of the mine and of the financial condition of the mining company. The value of the real estate in the mining districts usually varies directly with the aggregate value of the mines, and as the mines become exhausted the value of the real estate diminishes unless there are other local industries that can support the population previously engaged in mining.

This interdependence of interests has been demonstrated recently in several mining districts in which the important mines have depreciated in value. When the mining companies asked the Boards of Equalization for a reduction in the assessed value of the mines, the other property owners demonstrated the fact that the depreciation suffered by the mining companies was no greater than that suffered simultaneously by owners of dwellings and business houses in the mining community and that a reduction of the assessed value of the mines would result in greatly increased taxes upon other property. It was shown in a number of instances that the mining companies were no less able to pay taxes than were the other property owners.

The criticisms of the methods of taxing and appraising mines have come principally from four classes of writers, namely, (1) mining engineers, (2) mine operators and officers, (3) state officers and tax commissions, and (4) economists.

The criticisms of mining engineers have usually been directed at the methods of appraising mines for taxation rather

than at the system of taxation employed. The mining capitalist has frequently made a protest against increased assessment and changes in rates or in the system of taxation. In a number of instances protests have been filed against heavy public expenditures within the local taxing district. The mine operator and the mine capitalist are probably no less public spirited than those who furnish the capital for other industries; in fact, in many of the western and of the Lake Superior mining districts, the mining companies pay most of the taxes and realize that they must continue to do so.¹

The view point of the state officer is occasionally influenced by the demand made upon him for additional funds to meet the increased expenditure of the state. This criticism is not justified in general as, in most of the mining states, the members of the tax commissions and the other state officers have been broad-minded and fair in dealing with the mining industry, particularly when all property has been assessed at its true and full cash value. The mining companies have come to realize that they are more apt to secure justice by presenting all the facts in regard to the condition of their property, than if attempts are made to conceal part of the facts.

The criticisms of a number of the economists who have written upon the taxation of mines have been founded upon and formulated from their personal conceptions of public rights in minerals and have not been directed at the method of taxation itself.

In presenting the suggestions and criticisms of the various contributors, an effort has been made to point out suggestions that (1) can be formulated into laws not conflicting with existing state constitutions; (2) that may be feasible in most of the mining states; (3) that may be practical and economical of administration; (4) that will apply to all types of mines without discrimination; and (5) that will cause mines to contribute a fair portion of the necessary public revenue.

MINING ENGINEERS AND MINE OPERATORS

As previously noted, most of the criticisms and suggestions made by mining engineers and geologists have been directed at the methods of appraisal rather than at the system or method

¹In Ishpeming, Michigan, the 1912 tax roll was \$279,393 of which three mining companies paid 85 percent. The same condition prevails in Minnesota on the Mesabi iron range, and in some districts the mines pay more than 90 percent of the taxes.

of taxation. In this discussion attention will be directed particularly to the system or method of taxation, the purpose of this discussion being to show what the mining men themselves think of the systems of taxation and what changes they would advise.

Mr. James R. Finlay recommends that mining property be taxed for local purposes upon the value of the surface and of the equipment, and for state purposes upon the excess of receipts over expenditures. The combined taxes should not exceed the average levied on other forms of property. Undeveloped mineral lands should be valued exactly as unused real estate is valued, namely, at a fixed price per acre, "according to the prices fixed by mere trading. There is apparently no other basis."²

Mr. J. Parke Channing said: "There are radically different classes of mines; those in which you see all the ore and those in which you cannot see any. We must know it is impossible to get any method of taxation that is absolutely equitable. You have to get a method that is a compromise and get as nearly as possible to the truth. And, therefore, I am strongly of the opinion that a tax or valuation based upon the net or gross product or both is the most equitable."³

Mr. A. H. Rogers favors a "reconciliation of property and gross product taxes."⁴

Mr. Heath Steele has presented a program for the taxation of mines based upon apportioning to each industry in a state its share of the revenue to be raised by taxes. This burden should then be apportioned among the mines as follows:

1. A tax upon all surface lands owned, according to their use and value.
2. After the surface tax has been adjusted, a rate should be determined which, when applied to the yearly profits, would make up the balance necessary.
3. All buildings not used immediately in mining operations should be taxed at the same rate as other property.
4. All plants, equipment, unmined ore, and untreated ore on hand should be exempt from taxation.

In determining profits, Mr. Steele would permit deductions from receipts and the value of the finished product on hand as follows:

²*Bulletin of Mining and Metallurgical Society of America*, 1912, V, 158.

³*Proceedings of National Tax Association*, 1913, VII, 407.

⁴*Bulletin of Mining and Metallurgical Society of America*, 1912, V, 164.

Actual expenditures for mining, transporting, and treating the ore; refining and selling the product; and depreciation based on the original cost of the plant and equipment. He would not allow for the purchase price of the mine "owing to the many ways in which this account could be figured."⁵

Mr. H. M. Chancee concluded a discussion of the general subject of mine taxation with the following statement: "Taxation for revenue only, without the incidental purpose of restraint or regulation, would certainly seem to be the only form of taxation that is just and equitable to interests affected."⁶ He considers impractical the proposal to extend the Finlay system of appraisal to most of the metal mining districts owing to the cost of making the appraisal and owing to the nature of the ore deposits, but apparently favors a physical valuation or capitalization of earnings as the most practical method of appraising coal mines and lands.

The Coal Tax Commission appointed in 1907 to appraise the anthracite properties in Northumberland County, Pennsylvania stated: "Coal land in the process of mining becomes depleted from year to year, and finally exhausted and valueless as coal land. Its body has been destroyed and can never be restored; and, in order to earn any income from it, it is necessary to destroy it. Therefore it is evident that each and every ton of coal in the ground should share equally in the burden of taxation. This could best be accomplished by a uniform tax upon each ton as mined. There seems no equitable reason why the unremunerative ton of coal which is to lie dormant in the ground for fifty or one hundred years should pay taxes annually during that time while the remunerative ton which is mined and sent to market today escapes with only the one year's tax. We are therefore forced to the opinion that the only remedy for the existing difficulties surrounding the taxing of coal lands rests with our lawmakers, and they should act quickly, before the coal is all sent to market, thus escaping its equitable share of the cost of government. A tax upon the output annually seems the only remedy. The unremunerative coal contained in idle properties might be taxed at a nominal rate per acre for the coal,

⁵Steele, Heath. Mine taxation. *Engineering and Mining Journal*, 1914, XCVIII, 381.

⁶Chance, H. M. Taxation of mining property. *Proceedings of American Mining Congress*, 1913, XVI, 339.

similar to the present method of taxing unremunerative or unseated surface land.”⁷

Mr. William Griffith, an eminent mining engineer of the Pennsylvania anthracite fields, recently made a statement in regard to the existing conditions of appraisal and taxation in the anthracite districts.⁸ He concluded: “Anthracite should be taxed once and once only. Perhaps the better way to accomplish this would be to eliminate the taxation of coal as real estate, except in a nominal way, and lay a tax upon each ton of coal as it is mined, as is being advocated by the Scranton Board of Trade.”

Report of Coal Tax Commission of Northumberland County, Pa., 1907, p. 35.

⁸*American Mining Congress Journal*, 1916, II, 382. Mr. Griffith reports that the Commissioners of Lackawanna County have variously estimated the value of coal at from \$300 to \$500 per foot acre, and recently in Luzerne County one group of engineers employed by the landowners estimated the value of a certain tract of land at or around \$700 per surface acre, while another group employed by the county authorities estimated the same land at about four times this value. Mr. Griffith has used the royalty rate as a proper standard of valuation. “The supreme courts have declared that a perpetual lease is a sale and that the royalties are installments on the purchase price. Therefore, the royalty represents the value of the coal in the ground, and is a fair and equitable standard of value for estimating the worth of the coal; better to our mind than outright sales, because the sales of coal land in this locality are not frequent, and the deeds and records of such transactions usually cover up the actual selling price so that it cannot be ascertained. Of course, each property becomes a problem in itself, but having a basic standard, deductions or allowances may be made to conform to the various conditions and possibilities that may be peculiar to each property.

It will be noted that this method of ascertaining the taxable value of coal places the greater burden of the tax upon the coal in the going properties, which will be somewhat exhausted. For example, at the royalty rate of 30 cents per ton, other things being equal, the coal in a property which will be exhausted in ten years, would have a present value of 22 cents per ton, whereas at the same royalty rate the coal in an adjoining property which had a life of sixty years would have a present value of 8.1 cents per ton. To our mind, this is as it should be, because it is manifestly unfair to tax the unremunerative ton year after year at full rate for 60 or 100 years, whereas the remunerative ton of coal which is mined this year escapes with but one tax. And, along the same line, virgin properties which are held for future mining, should, to our mind, be considered in the same manner as we now treat unremunerative, unseated lands, by imposing a sufficient nominal tax until such time as they become productive.”

Mr. R. V. Norris has considered particularly the taxation of anthracite mines and lands in Pennsylvania. He objects to the methods of taxation and of appraisal at present in use on the ground that they lead to the "rapid and uneconomical exhaustion of the mineral wealth of the country, and put a premium on premature and wasteful exploration." He proposes the following program: "The proper method of taxation for all minerals appears to be a tax based on the value at the mine of each year's product at the local rate of taxation assessed for that particular year, including an assessment on surface lands, outside improvements and machinery, the value of which is readily ascertainable; but not including any valuation of mine openings, or inside improvements, which are incidental to the mining process and which after the exhaustion of the mineral are of no value."⁹

The proposals of Mr. E. B. Kirby and of Mr. R. B. Brinsmade are presented under the discussion of the single tax.¹⁰

Mr. R. C. Allen, State Geologist of Michigan, who is officially Mine Appraiser for the Michigan Board of State Tax Commissioners, favors the general property tax and the appraisal of mines upon the ad valorem basis after the methods developed in Michigan.

Dr. C. K. Leith, who has had extensive experience in the appraisal of iron mines and lands, was a member of the Committee on Taxation of Mines and Mineral Lands appointed by the National Tax Association which favored the general property tax and careful appraisal.¹¹

Mr. W. L. Uglow, in a recent bulletin of the Wisconsin Geological and Natural History Survey,¹² favors the use of a method of equating income with property valuations so that mining property may bear its fair share of the taxes. A factor is determined which when applied to the general property tax rate will give the proper rate to be levied upon the income of the mining property. This procedure is recommended particu-

⁹Norris, R. V. The taxation of coal lands. *Proceedings American Mining Congress*, 1913, XVI, 331.

¹⁰*Infra*, p. 250.

¹¹This committee endorsed the system of appraisal now in use in the Lake Superior district and opposed gross and net methods of taxation. *Infra*, p. 249.

¹²Uglow, W. L. A study of methods of mine valuation and assessment. Bulletin XLI, *Wisconsin Geological and Natural History Survey*, Madison, 1914.

larly for short-lived mines that have relatively little ore in sight.

Professor J. Daniels in an address at the Washington State Tax Conference in 1914 favored "some form of nominal holding-tax on the land until it develops into a producing property and, when the mine reaches the active point of production, the value of that property as a going concern should be used as the annual basis of assessment of taxes."¹³

Professor M. Roberts in discussing the address by Professor Daniels said, "It seems difficult to avoid making use of the general property tax in some degree in taxing mining property. In an undeveloped district the holding-tax should be quite light. In developed districts and where there is regularity to the deposits it can be somewhat heavier."¹⁴

The opinion of Hon. E. D. Boyle, Governor of Nevada, is particularly interesting because he is a mining engineer and his experience as a state official has given him an intimate knowledge of the problems of providing public revenue. In a paper on "Mine Taxation," after discussing the gross income tax on railroads and other utilities, he concludes: "Granting then, that a royalty system of commutated taxation as applied to the public utilities has proven a workable and generally satisfactory proposition, why not apply it to the mines? The mine, unlike the railroad once under exploitation, can show an income only by the extinguishment of its capital. It is obvious therefore that in determining the percentage of the mine's gross income to be paid we must take this fact into account and the rate of the royalty should be such as to fairly well equalize the assessments between the two classes of property. Since the mine is usually practically valueless when the mine is exhausted, improvements should be considered as a part of the mine—no tax levied against them other than the one royalty against the whole property. An analysis of this system, using 2 per cent of the gross income as the basis of the tax, based on the experience of the leading properties of Nevada for its past two years indicates that (1) the Nevada mines would pay 65 per cent more taxes than they do at present; (2) with few exceptions among the larger mines the percentage of the capital value, as far as the same may be estimated, paid annually in royalty would be less than one per cent,—this figure being deemed to represent a fair

¹³Daniels, J. Taxation of mineral lands. *Bulletin of University of Washington*, General Series No. 84, August 1914, p. 88.

¹⁴*Ibid.*, p. 89.

proportion of capital value taken in taxes annually on all property throughout the United States; (3) low-grade mines producing large tonnages with a small margin of profit do not appear to be more adversely affected than the higher grade mines, owing to the fact that the exemption of their usually large and expensive plants acts in a compensatory manner. It appears to me that the gross proceeds tax, perhaps modified in the cases of certain mines operating under adverse conditions, is just as rational and just as scientific in actual practical operation as any of the systems thus far proposed. If this be true it is certainly the simplest and deserves a trial somewhere in the west."^{14a}

Mr. F. F. Sharpless, a well-known mining engineer, said:

"While we may not all agree, evidently we do not agree, upon a proper basis of taxation, we can and do agree upon the proposition that mines should not bear more than their due proportion of the burdens of the community. Professors of economics and tax experts may be able to enlighten us on the technique of assessment and the collection of taxes, but unless they are fully informed as to the nature of the mining business, and wherein it differs from other commercial enterprises, and wherein one type of mining differs from another type, such experts will not be able to do justice to the mining business. The majority of mining men are honest and are willing to pay their due proportion of taxes. The majority of assessors are honest, and desire to tax justly. What then is needed is co-operation between these two classes of citizens. Lobbying with law-makers may yield temporary relief, but this is not what is required. Education of the miner as to methods of taxation, and education of assessors as to the nature of the business they are assessing is more to the point. There must be co-operation, instructive and constructive, or mining taxes will grow rapidly."

In objecting to the arbitrary and unscientific methods generally employed in the valuation of coal lands for the purpose of taxation, Mr. S. A. Taylor said:

"In order to arrive at a fair conclusion or fair valuation it would probably require some persons of more expert knowledge of the value of coal lands than is generally possessed by assessors, and while I realize that the person or persons who would

^{14a}Boyle, E. D. Mine taxation. *Proceedings of National Tax Association*, 1915, IX, 80.

^{14b}Paper before Mining and Metallurgical Society of America. *Mining and Engineering World*, 1915, XLII, 1168.

be most capable of serving on such a commission would be selected from among those having a broad experience in investigating virgin coal lands, in the actual operation of mines, and in the selling or marketing of the product of the mines, and might cost the districts that are levying the taxes some money for a report on the values within the district, yet in the end I believe that if this plan were adopted, it would give more general satisfaction, in that it would be more equitable."

In a conference between representatives of Arizona mining companies and the members of the Arizona Tax Commission held October 29, 1912, the representatives of the mining companies made the following proposal:

1. That all patented mines be assessed per acre at the price paid to the United States Government therefor.
2. That all improvements upon said mines be assessed by the State Tax Commission at the same value as other property.
3. That the net earnings from said mines be ascertained and assessed at 100 percent. of the true value thereof.
4. That in addition thereto all producing mines be assessed upon 12.5 percent. of the gross product or yield thereof in value.¹⁵

STATE OFFICERS AND TAX COMMISSIONERS.

State officials and members of the tax commissions are frequently obliged to consider "policy and expediency" as well as the "canons of taxation." However, it may be assumed that the executive officers of the state are interested in administrative problems which have to do with productivity, economy, elasticity, and certainty of a revenue-producing system. In the administration of mine taxation in the various states that employ tax commissions the problems peculiar to mine taxation have received special attention and from time to time the reports of the tax commissions have carried recommendations to the state legislatures. Following is a condensed statement of a number of these recommendations which have not been formulated into laws.

¹⁴Taylor, S. A. Valuation of coal lands. *American Coal Journal*, October 16, 1915.

¹⁵*First Report, Arizona State Tax Commission, 1912*, p. 63. The Arizona legislature enacted a law effective in 1913 and 1914, providing that producing mines be assessed at 400 percent of the net earnings plus 12.5 percent of the gross.

The Minnesota Tax Commission in 1902 regretted that the constitution of the state did not permit the enactment of a tonnage tax. In the opinion of the members of the Commission "a tonnage tax is the only appropriate means for the taxation of the output of mines."¹⁶

Again in 1908, the Minnesota Commission pointed out the desirability of a tonnage tax although at that time most of the members were apparently reconciled to the working of the general property tax. Mr. O. N. Hall filed a minority report opposing the endorsement of a tonnage tax by the Tax Commission.¹⁷

A tonnage tax is not favored now by the Minnesota Tax Commission as it is claimed that it would require a graduated tonnage rate, which would be more complicated than the system now in force. This graduated rate would be based upon the quality of the ore, cost of mining, etc. It probably would be more difficult to administer than the general property tax.

The Wisconsin Tax Commission in 1910 commented on the difficulty of assessing mineral land and said: "It would be more logical and tend to better administration if the lands were assessed without regard to the minerals, and the latter subjected to an occupation or privilege tax when extracted, or even included under the income tax."¹⁸

The message of the Governor of Wisconsin, January 12, 1911, contains practically the same statement. He suggested that the occupation tax should be proportionate to the value of the amount of ore removed.

A suggestion of the Wisconsin Tax Commission in 1915 was embodied in a bill to create Section 1053 of the Statutes providing for the valuation and assessment of lands containing deposits of lead and zinc. In general, the proposed plan of assessment was an attempt to equate the earnings of lead and zinc mines with the valuation of property; this was to be done by multiplying the sum of the royalties paid and profits earned by two and four-tenths. The sum so obtained was to constitute, for purpose of taxation, the full and true value of the lands.

It has been suggested by tax officials in Wisconsin that society might receive the greatest benefit from the mineral and other resources if economical development and use were made the prime object rather than possible revenue. Mine operators

¹⁶*Report of Tax Commissioners, 1902, p. 43.*

¹⁷*First Biennial Report, Minnesota Tax Commission, 1908, p. 146.*

¹⁸*Fifth Biennial Report, Wisconsin Tax Commission, 1911, p. 16.*

might be encouraged or forced to recover a maximum percentage of the mineral if wasteful methods were penalized by taxation.¹⁹

In discussing the separation of state and local revenues the Commission of Inquiry into Taxation in Michigan in 1911 advised that "mining corporations should not, through separation, be exempted from the burden of state taxation, and a part of the state revenues should be realized from the mines." The commission recommended further that, in the case of separation, "for the present an amount equal to one-ninth of the demands of the state for general expenses be imposed upon mining property."²⁰

Mr. C. M. Zander, a member of the Arizona State Tax Commission, favored taxing mines as other property upon an ad valorem basis. He believes the Michigan system can be adapted and declares the only administrative difficulty in the West to be "lack of power by a central authority. As soon as some western state delegates that power a great advance can be looked for."²¹

On the other hand his associate, Mr. P. J. Miller, advocated as strongly the taxation of mines upon the basis of gross and net earnings. His recommendations in the report of the Tax Commissioners were as follows:

"That a specific tax law be enacted similar to the one passed by the last legislature except that the net proceeds alone be made the basic factor and increasing the multiple from four to whatever figure the legislature may think proper.

"That by eliminating the tax on the gross proceeds and fixing a minimum net of twenty-five thousand dollars for the producing mines will put the larger properties in a class by themselves and tend for equity in assessments between them. This will also prevent properties that are valuable but are making but a small net, from being assessed at almost nothing, as was possible under the present law.

"That all surface ground of mining claims lying within the corporate limits of cities or towns, whether used for mining or other purposes, be assessed as other real estate is assessed and taxed in said cities or towns.

¹⁹Compare with L. C. Gray's statement, *Quarterly Journal of Economics*, 1914, XXVIII, 486; Uglow, W. L., *Bulletin* XLI, *Wisconsin Geological and Natural History Survey*, 46; and Report of Committee on Taxation of Mines, *Proceedings of National Tax Association*, 1913, VII, 387.

²⁰*Report of Commission of Inquiry into Taxation*, Lansing, 1911, p. 36.

²¹Zander, C. M. Taxation of metalliferous mines. *Proceedings of National Tax Association*, 1914, VIII, 338.

"That all smelters, mills, and reduction works owned and used in connection with any producing mine be included in the value of the mine.

"That in case a producing mine closes down for a period of three months or more on account of litigation, on account of accident, or on account of the depreciation of the value of its product below the cost of production or for any other reason, the State Tax Commission be given power to assess that mine by finding the average of its net for the past five years and multiply that sum by the factor provided in the mine tax law, the resulting amount to be the assessable value of said mine.

"That a section should be included in the mine tax law empowering the State Tax Commission to prescribe a uniform system of accounting for all producing mines in order that the 'net proceeds' be arrived at uniformly."²²

Honorable R. E. Sloan, formerly Governor of Arizona, in an address made before the Conference of Governors in 1910, favored taxing the gross and not the net proceeds, as being less inquisitorial and as eliminating all questions of good or bad management.²³

Mr. J. B. Phillips stated that the Colorado Tax Commission found it necessary to recommend to the legislature the bill changing the assessment of mines, making the assessment on fifty percent of the gross and all of the net from metalliferous mines. This was due to a decision of the Supreme Court defining 'gross' which resulted in the reduction of the valuation of the mines of the state by between eight and nine million dollars.²⁴

The Nevada Bullion Tax Agent in 1912 favored a graduated tax on gross output, rather than a tax on net output.²⁵

Mr. C. S. Patterson, of the Utah Board of Commissioners on Revenue and Taxation, recommended in 1912 that mines in Utah be classified and that a higher and graduated rate be applied to property of this class taxed upon net proceeds.²⁶

²²Miller, P. V. Assessment of mines. *Ibid.*, 1913, VII, 394. *Engineering and Mining Journal*, 1913, XCVII, 969.

²³*Proceedings Second Meeting of Governors*, Washington, 1910. p. 146.

²⁴Phillips, J. B. Legislative and administrative problems in Colorado. *Proceedings National Tax Association*, 1914, VIII, 96.

²⁵*Report of Nevada State License and Bullion Tax Agent*, 1912, p. 8.

²⁶Patterson, C. S. Report Special Tax Commission of Utah. *Proceedings National Tax Association*, 1912, VI, 432.

Mr. T. C. Townsend, formerly identified with the work of the West Virginia Tax Commission, recommended a production tax for oil and gas as follows:

“The most feasible, scientific, and common-sense method of taxing oil is to impose the production tax. The State of West Virginia, as well as all other states and countries that produce oil, ought to come to this tax. The amount should not be great, perhaps one-third to one-half cent per barrel,—and it should be used exclusively for the support of the State government. In oil-producing states this tax would aid largely in bringing about a divorcement of state and local revenues, an end much desired in the tax system of any state. It is thought a production tax could be imposed in most, if not all, states without encountering constitutional barriers.²⁷ A production tax on natural gas is the only feasible method of taxing it under a constitution like that of West Virginia, and the only method that can be devised that will compel this class of property to bear its equal share of the burdens of taxation.”²⁸

In outlining a model system of state and local taxation, Mr. Lawson Purdy proposed that mineral rights should be included among the subjects of state taxation because, “their value does not depend upon local expenditure, or the value of the local government or on the extent of local population. Deposits of coal, iron, and other minerals owe their value to the demand for their use by the country as a whole.”²⁹ He held that the state should receive from rich and profitable mineral deposits a revenue greater than that which would be secured if the state levy were apportioned according to local expenditures. Therefore, the state should tax mineral rights directly. Ordinarily a state tax on mineral rights should not be imposed upon the site value of the land, because the surface can be used for agriculture or other purposes, while mining is going on beneath the surface. In some cases the deposits of ore are so close to the surface that the operation of mining the ore is like quarrying stone. In this case it might not be possible to allow the local community to tax the site at all, and provision might be made for a division of the proceeds of a tax on the mineral rights. With the exception of such mines as are practically quarries, the tax for state purposes

²⁷*Ibid.*, 1908, II, 407.

²⁸*Ibid.*, II, 409.

²⁹Purdy, Lawson. Outline of a model system of state and local taxation. *Ibid.*, 1907, I, 63.

could be imposed on the mineral rights alone, and the local tax districts could be allowed to tax the surface for local purposes.

The Committee on Taxation of Mines and Mineral Lands in its report to the National Tax Association, in 1913, recommended (1) the valuation of explored and developed mines as other property, and (2) indorsed in general the system employed in Michigan, Minnesota, and Wisconsin. The Committee opposed (1) gross and net methods of taxation and (2) taxes on the basis of market value of stocks.³⁰

ECONOMISTS.

Dr. L. C. Gray holds that, "a tax on the mine will in no way affect the supply of the product placed on the market at present" but it may disturb the relation between present and future. Much depends on the manner in which the tax is applied. An annual tax on the value of the mine, provided the tax is expected to be permanent, "will increase the tendency for the mine owner to remove the coal in the present rather than in the future. This will be true even if all so-called rent and a part of the royalty is taken by the tax. Far from preventing the mine from being utilized, it will actually increase the amount of coal placed on the market; and, if demand is constant, will probably lower the price." A tax upon the annual surplus will not have this effect but will "take a certain share of each dollar of surplus whenever it appears."³¹ A tonnage tax at a fixed amount per ton will probably encourage a slower rate of utilization, depending upon the present value of the product.

Dr. Frank L. McVey in an address on a "rational system of taxing natural resources" said, "Without question, the general property tax, as it now stands upon the statute books of the different states, does not meet in any one sense of the term the general economic conditions and the special needs of mining. The same principle which is applied in the case of timber lands, namely, the taxation of the product, should be applied to the taxation of mineral properties. There is no question that the easiest way, and the most satisfactory and acceptable way to all concerned, is a tonnage tax, varying possibly with the character of the ore and the cost of mining, but always depending for the rate and the amount upon the ore that has been mined. The

³⁰*Ibid.*, 1913, VII, 387.

³¹Gray, L. C. Rent under the assumption of exhaustibility. *Quarterly Journal of Economics*, 1914, XXVIII, 466.

taxation of the surface upon some such basis as that seen in the case of the timber tax will provide a regular income supplemented by the amount of the tonnage taxes. The real essence of the tonnage tax lies in the fact that value found in the ground is distinctly a product of nature, which an ad valorem tax can not recognize, and in consequence the state's right to a share of the value of the earth's products, together with the diminishing value element involved, is overlooked.⁷³²

It has been suggested that the tax rates upon certain kinds of mineral properties shall be progressive. Professor F. W. Taussig in making a general statement regarding progressive taxation says it "is not practicable on the basis of the kind of income. It is susceptible of application, on a wide scale, only with reference to the amount of the income."⁷³³

In discussing unearned increment as applied to mines, Professor Taussig suggested that "it is difficult to see how any other method than that of long leases could secure the desired ends,—the effective utilization of resources and the conservance of the public's fundamental equity. The uncertainties of mining are such that any recurrent carving out of economic rent is quite impracticable. The only feasible policy would be that of allowing private enterprise to take its risks and reap its rewards over a stated period. No doubt the possessor or tenant during his term would be tempted to work the mine to the utmost and perhaps exhaust it; a difficulty possibly to be met by requiring the payment of a progressive royalty as a large output was reached. Here as elsewhere, occasional great gains to lucky or shrewd investors must be accepted with equanimity; a policy too grasping overreaches itself."⁷³⁴

From the foregoing expressions of Professor Taussig it is apparent that a policy of distinguishing the income of mines from income derived from other sources and taxing the mining income under progressive rates is a questionable practice. Similarly, the suggestion that mines be singled out and taxed upon unearned increment is not favored by Professor Taussig and a number of other economists.

In discussing the fiscal policy and mineral deposits, Professor H. C. Adams says, "Mines that are widely spread and

⁷³²*Quarterly Journal of University of North Dakota*, Jan., 1911, pp. 146-151.

⁷³³Taussig, F. W. *Principles of Economics*, II, 484.

⁷³⁴*Ibid.*, II, 101.

easily discovered may be treated like the property of ordinary industries. No special financial policy is required for minerals like coal, iron, or salt. Mines, on the other hand, which form the basis of a natural monopoly should be handed over to private enterprise for development, but they should at the same time be recognized as a fit object for special³⁵ and peculiar taxation.³⁶

A corporation tax is favored by Professor Adams in order to reach such differential profit as may result from natural monopoly or specially rich deposits.³⁷ The basis of this taxation should be the royalty which "particularizes itself" with the mineral industry.³⁸ Natural monopolies, such as mines, should be the object of state taxation.³⁹

In discussing the division between state and local taxation, Professor I. A. Loos favors state taxation of mineral rights. "On the basis of economic analysis, as well as in the light of historical public policy, the community has a large claim upon mineral deposits."⁴⁰ He suggests that, in the states in which important mineral deposits are situated, there be undertaken "legal and constitutional methods of approach to this source of revenue."

Professor O. D. Skelton, of Queen's University, Kingston, Ontario, advises that mineral resources should be reserved for state rather than local taxation.⁴¹ If adequate taxes were imposed on mines by a municipality, more revenue would often be raised than is legitimately required. Regarding the appraisal of mining property he comments as follows: "Any estimate of the value of the minerals in the ground must, it is felt, contain a large element of guess-work, diligent and scientific guess-work it may be, but guess-work still." He therefore prefers a tax on the output or net profit on account of its greater certainty. In his opinion a satisfactory and more or less uniform system of accounting can be enforced so that the principal objections to a net profits tax can be overcome.

³⁵Discriminatory legislation would be unconstitutional in most of the important mining states.

³⁶Adams, H. C. *The Science of Finance*, p. 239.

³⁷*Ibid.*, p. 452.

³⁸*Ibid.*, p. 464.

³⁹*Ibid.*, p. 501.

⁴⁰Loos, I. A. The division between state and local taxation. *Proceedings of National Tax Association*, 1908, II, 66.

⁴¹Skelton, O. D. The taxation of mineral resources in Canada. *Ibid.*, 1908, II, 385.

Professor T. S. Adams in discussing the practical problems of taxation said: "There is one fundamental principle that men of the technical type particularly forget, and that is that taxes on mines must in some way be equated with the burden of taxation resting upon other property. The general system of taxation under which we exist is a property tax, not an income tax, and the burden of property taxes, if translated into terms of income taxation requires rates so excessive that the ordinary legislature will not impose them. If the burden of property taxation is to be translated into product or income taxes, then the average mine owner must be educated up to endorse and accept a rate of income taxation far beyond anything which he has heretofore considered."⁴²

Professor Seligman, in advocating a tax on income rather than a tax on property, said: "Let us recognize the fact, once and for all, that a system of property taxation, except in so far as certain forms of real estate are concerned, is unsuited to modern economic conditions as the ordinary and principal source of revenue, however strong the arguments may be for its utilization in exceptional crises as during the present European conflict. Let us boldly face the situation and confess that while a classified property tax may constitute the only possible step in advance for those states that are still tied up by a rigid constitution, the scheme is inapplicable to, or undesirable for, those states which are more fortunately situated from the constitutional point of view; and that even in the former class of states the energy that is being developed in the promotion of a classical property tax might more profitably be directed to what is at all events a more thorough-going remedy. What then is this better remedy and what is the next step for states like New York? I have no hesitation at the present time in answering: the substitution of income for property as the basis for taxation."⁴³

SINGLE TAX PROGRAM.

It is claimed by the advocates of the single tax that taxation of land values "will open up the mineral resources of the country to capital and labor. By stimulating the demand for labor and undermining the power of monopoly to hold mineral lands out of use, or close mines, it will lead to an enhancement of the wage rate. By stimulating production and operating to reduce roy-

⁴²*Proceedings of National Tax Association*, 1913, VII, 409.

⁴³*Proceedings of National Tax Association*, 1915, IX, 134.

alties, it will, at the expense of the monopolist, cheapen the commodity produced. It will furnish the state with revenue, with which to unburden industry." An illustration is cited of an English coal mine which mined 846,642 tons of coal in a given year. The company paid taxes amounting to \$27,490. The land owner who received the royalties paid \$4,250 in income tax. If the royalties be capitalized at 4 percent and taxed at the prevalent rate, the tax would be \$17,200 instead of \$4,250. It is claimed that "such an impost would place the state in a position to substantially relieve the mining industry of present rate burdens, thus giving a further stimulus to legitimate enterprise."⁴⁴

The single tax program in America is presented in the writings of Mr. E. B. Kirby⁴⁵ and Mr. R. B. Brinsmade.⁴⁶ The principal suggestion of this program is that a separate tax levy should be made on mineral land and improvements, and that the former should then be increased and the latter diminished until speculative holders are obliged either to sell or to operate. Mr. Kirby objects to the plan of taxing successful mining operations and exempting unprofitable mines and points out the effects of applying the same principle to other forms of property in those states in which mines are taxed on this basis. In discussing the problem of valuing mines for taxation he notes that "value is a market fact, and not what some one thinks it ought to be." He suggests that the most important means of securing accuracy and fairness in assessment of mines is publicity, "letting every man know what his neighbor pays."

"The scientific principle which is now forcing its way into the taxation systems of civilized countries is that the burden must be carried not by productive industry, as at present, but by natural resources. The effect of this upon mining would be to stimulate the active operations of exploration, discovery, and production and to discourage speculative holding of unused mineral land."⁴⁷ The taxes upon operating mines would be greatly re-

⁴⁴Chomley, C. H. and Outhwaite, R. L. *Land Values Taxation in Theory and Practice*. London, 1909. Chap. IX, p. 89.

⁴⁵Kirby, E. B. Principles of mine taxation. *Engineering and Mining Journal*, 1911, XCII, 853, 928. *Public*, 1913, XVI, 713.

⁴⁶Brinsmade, R. B., Natural taxation of mining land. *Mining World*, 1909, XXXI, 1023. Discussion of J. R. Finlay's paper on "Valuation of iron mines." *Transactions of American Institute of Mining Engineers*, 1914, XLV, 324.

⁴⁷Kirby, E. B. *Public*, XVI, 714.

duced and eventually all taxes upon machinery, equipment, improvements, or production would cease and the only tax remaining would be that upon the value of the land on which the mines are located. In the opinion of Mr. Kirby, this will encourage prospecting and the development and operation of mines. The extent of the speculative holdings of mineral land is so great that it is believed the state would secure adequate revenue by shifting the tax burden to such lands.

Similar ideas have been advanced by Mr. Brinsmade and the suggestion is made that mine operators should assess their own property with the understanding that the state may purchase it within a year at the assessed value.

Mr. C. B. Fillebrown urges that monopolies and special privileges should properly share with land values the burden of taxation and cites particularly natural resources privately owned, such as gold, silver, copper, iron, and coal mines, and oil fields.⁴⁸ Similar views are held by Mr. T. G. Shearman.⁴⁹

CONCLUSIONS.

It is evident that the taxation of mines as conducted in several states has aimed at more than the raising of revenue for immediate public needs. The conclusions presented herewith have been reached under the presumption that taxes upon mines are levied for the single purpose of providing public revenue. However important government regulation of the use of mineral resources may be, it has not been considered as the controlling purpose in taxation or the purpose that makes taxation necessary.

It has been deemed inadvisable in this study to attempt to present a program of mine taxation that would not fit into the general methods of taxation now employed in the states, for it is possible that the system of taxation that is ideal from the viewpoint of the mining industry would be entirely impractical for other industries or unconstitutional in many of the states.

It is difficult to answer the general question "Are mines paying their share of the taxes?" It has been pointed out in specific instances that from the data available it may be inferred that certain types of mining property are not paying their share of the taxes collected for state and local purposes.⁵⁰ In most of the im-

⁴⁸Fillebrown, C. B. *The A. B. C. of Taxation*. N. Y., 1909.

⁴⁹Shearman, T. G. *Natural Taxation*. N. Y., 1898.

⁵⁰*Supra*, p. 224.

portant petroleum producing states the petroleum wells are paying in taxes a smaller percentage of their earnings than are the coal and ore mines. In a number of the western states the percentage of net earnings paid in taxes by the precious metal mines is much less than the percentage paid by the Lake Superior copper and iron mines.

It may be appropriate to note that as a rule the general fiscal policy in the various states is based upon the annual needs and that taxes are levied annually at rates sufficient to meet the expenditures (including interest on bonds) for the current year. According to the general plan, only so much revenue is raised during a particular year as is required for that year. This fiscal plan does not fit in well with what seems to be a convenient and just plan of mine taxation, namely, that the aggregate taxes paid by a mine during its life should be a fair share of the total earnings of the mine and at the same time a fair share of the total taxes raised during the same period for state and local purposes. During the most profitable years of the mine's operations the total amount of revenue required may be small and the amount of taxes paid by the mine may be proportionately small; while, in the unprofitable years of the mine's operations, and when therefore its appraised valuation is low, the amount of public revenue required may be large. It would be just to consider the entire life of a mine and in some way to adjust the tax burden to the varying needs of the community. Some of the distinctive characteristics of mining would thus be recognized. The system of taxing property in general upon an ad valorem basis fails to meet this situation, for, as has been noted previously, a mine may partially escape taxation by increasing the annual output and thus rapidly exhausting the mineral deposit so that the number of years during which the mine is subject to taxation is reduced.

As previously noted the constitutions of some of the states limit or prescribe the method of taxation. While the constitutions of several states have been amended in order to permit special methods of taxing mines, the difficulty of amending a state constitution is so great in some instances that a program of taxing mines that would require the amending of a state constitution is not presented.

It is suggested in general that the tax system should be designed so that:

1. The taxes levied upon the mining industry will be no heavier than those levied upon other industries.

2. The methods of administration will be no more inquisitorial in relation to mining than in relation to other industries.

3. Systematic exploration and development, efficient operation, and production of the maximum total tonnage from each deposit will be encouraged.

4. Proper cognizance will be taken of the fact that mine openings, buildings, and much equipment have value only when there is a mineral deposit available for working and that the equipment and openings practically become of no value after such a deposit has been worked out.

The essential differences between the systems of taxing mines now employed in the states have been presented and in review it may be noted that:

1. The general property tax is not adapted to mines and mineral lands unless they are valued by competent appraisers, preferably under state supervision.

2. The gross receipts tax does not secure equality and justice.

3. The net receipts tax may be desirable in the form of a state income tax applying to all property. The accounting should be regulated by state officers, preferably under civil service. The Wisconsin system of taxing incomes is recommended.

4. Tonnage taxes are unequal and unjust.

5. The statutory definitions of real estate and of personal property should be specific and definite enough to include all forms of mining property and all rights appertaining to mines, such as mineral lands, mining rights, leaseholds, plant, equipment, improvements, broken ore⁵¹ or stored mineral, and royalties.

The important questions attracting the attention of the tax officials and mine operators are notably the following:

I. What mining property shall be taxed?

2. Who shall tax it?

3. How shall it be taxed?

⁵¹The distinction between ore in place and mined ore has been made in certain states. Few states have actually carried out fully the distinction that ore as soon as broken and while remaining underground becomes personal property. It would apparently work a hardship on a number of large mines that store underground immense quantities of broken mineral if this material was taxed annually as personal property at its full market value. Apparently no state has yet passed upon this important question, although the courts have held that broken mineral underground is personal property.

4. How shall it be valued? and
5. At what rate shall it be taxed?

1. The conclusion that has been reached, after an investigation of the data at hand, is that all forms of mining property should be taxed according to their true present value. The practice of exempting mines from taxation does not tend, in the long run, to make the mining industry an asset to the community.

2. The question as to whether mines should be the subject of state taxation alone or of both state and local taxation has aroused much discussion. The weight of opinion seems to be in favor of the latter but with the rate of local taxation limited by state law.⁵² If the local units are not permitted to tax mines, many mining districts would not be able to secure adequate public revenue without imposing an unjust burden upon the owners of other property in the community.

3. As most of the state constitutions prescribe that taxes upon all property shall be uniform, the general property tax has been employed extensively and is at present the prevailing method, in fact, under existing conditions, it seems to be the most feasible, just, and economical method of taxing mines and mining property.

4. The foregoing statement is conditioned upon a scientific appraisal by officers working under centralized administration. If all property is appraised at its full value, mines and mineral lands will bear their proper share of the taxes if it is planned that taxes shall be uniform upon all property. Under such a centralized system of appraisal, the accounting problems will be less difficult for the appraiser, the depreciation of mines will be provided for adequately, and the technical problems in general will be less intricate.

It has been urged that special methods of taxation should be provided for the different types of mining property. Particular mention has been made of three types of producing mines, namely, (1) those operating at a profit, (2) those developed but unprofitable, and (3) those being developed. Special methods have been suggested for unproductive mineral property such as (4) property equipped but not being operated, (5) property

⁵²*Supra*, p. 249. A number of economists favor state taxation of mineral resources and local taxation of the improvements, equipment, and surface rights. Professor Taussig recommends that taxes upon real property be relegated to the local taxing bodies. (*Principles of Economics*, II, 527).

equipped and being operated, (6) property unequipped but explored, and (7) unexplored mineral land. From time to time property of all the types noted is appraised for the purpose of purchase or sale. There is apparently no reason why similar methods of appraisal may not be employed for the purposes of taxation. Under such circumstances there appears to be no valid reason for providing a special method of taxation for these types of mining property.

5. The state constitutions of a number of the states specify that the rate of taxation shall be uniform upon all property. The suggestions that the general tax rate be graduated and applied to mines assessed in an arbitrary manner according to state laws appear to be inadvisable. If mines and all other property are assessed at full value, the rate of taxation should be the same on all property.

If mines are to be taxed upon income, it is suggested that the rate be graduated according to the rate of return upon the cost of the mine or the actual paid-in capital. This suggestion is made upon the assumption that all industries and corporations will be taxed in the same manner. In this way part of the unearned increment will be taken by the state. An income tax which is graduated according to the earnings of a corporation and which does not consider the actual capital invested discriminates in favor of the small corporation or the small mine.

SUMMARY.

Under the presumption that taxes paid upon mines are levied for the single purpose of providing the necessary public revenue, the following principles are advocated:

1. When the state constitution prescribes that taxes shall be uniform upon all property, a centralized system of appraisal, similar to the Michigan plan, is desirable.

2. When the state constitution specifies that taxes shall be uniform upon all property in the same class, all property—including mines and mineral lands—should be appraised at full value, and the taxes upon mines should be equated as nearly as possible with the tax burden upon other property.

3. When the state constitution prescribes no limitations upon taxation, the taxes upon mines should be equated as nearly as possible with the tax burden upon other property. Under these conditions, mines should be valued according to some approved system of appraisal like the Michigan system or, in the

case of short-lived mines, the present value should be estimated according to the ratio between the income of the mine under consideration and that of a mine of the same type which has been regularly inspected and appraised.

4. When the state constitution permits taxes upon income and progressive taxation, the tax should be graduated, not upon total income but upon the percentage of earnings on the cost of the mine or on the paid-in capital of the corporation.

5. Mines should be taxed for both state and local purposes, the local rate being limited by state law.

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